MISSISSIPPI LAW JOURNAL

SYMPOSIUM ON WORKERS' COMPENSATION

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INTRODUCTION

The editorial board of the *Mississippi Law Journal* began discussing potential topics for the 1993 symposium issue in the Spring of 1992. Such important topics as legal malpractice, civil rights and securities regulation were all considered as possibilities. However, soon into the topic search process, the board made the decision to shift the focus to producing a symposium issue which would serve as an instructive, working reference for lawyers practicing Mississippi law rather than producing a compilation of articles on a general topic of current interest. The 1993 Worker's Compensation Symposium Issue accomplishes the object of that decision. In the articles that follow, lawyers from the state of Mississippi and the surrounding area will be introduced to fresh, intelligent ideas and insights as well as practical, comprehensive analysis of the existing statutes, cases and proposals which compose the current body of Mississippi workers' compensation law. Given the expertise and authority of the contributing authors, these articles will prove to be a shaping force in the development of workers' compensation law in this state. If Mississippi lawyers find this issue to be helpful in their practice, then the goal of the editorial board will have been achieved.

University of Mississippi Professor of Law John R. Bradley examines the problems which have resulted from the overlap in scope of the two statutes which prescribe the time limitations for bringing workers' compensation claims. Professor Bradley argues that the two statutes do not contradict one another, and he provides the reader with practice solutions for the proper application of these statutes in "medical only" and "disability" cases. Additionally, the reader will gain an improved understanding of the often confusing line of cases which have interpreted these fundamentally important statutory limitations.

James E. Higginbotham, II, who is an Administrative Law Judge, Mississippi Workers' Compensation Commission examines the scope of discretionary review to be exercised by the Mississippi Workers' Compensation Commission before and after a final judgment. Recent Mississippi Supreme Court decisions have brought confusion to this area. Judge Higginbotham argues that the Commission's exercise of discretion should depend upon whether a "final judgment" has previously been entered.

Alison Steiner, who serves as Vice-Chair of the Mississippi State Bar Labor and Employment Section, discusses the relationship between the Americans with Disabilities Act of 1990 (ADA) and Workers' Compensation Law. Ms. Steiner's article considers the conflicting requirements of the ADA, which limit the disclosure of employee medical information, and the Workers' Compensation Act, which requires employers to provide such information to the Commission. The article further explores when the ADA may require an employer to reasonably accommodate an employee who is disabled under workers' compensation law. Ms. Steiner also examines the broader implications that the substantial federal remedy, provided by the

ADA, could have on the range of employment actions commonly exercised by employers.

Pepper Crutcher, a partner with the firm of Phelps Dunbar in Jackson, Mississippi, discusses the impact of the Americans with Disabilities Act from the perspective of the employer. Mr. Crutcher offers insight into how employers can contend with their obligation to reasonably accommodate employees under the ADA who are considered to be disabled under workers' compensation laws. Mr. Crutcher also leads the reader through the technical regulations of the Equal Employment Opportunity Commission guidelines which affect currently acceptable employment practices and the manner in which claims are defended.

Finally, I want to acknowledge the amount of work that Professor Bradley contributed to the publication of the symposium issue. In addition to writing the feature article, Professor Bradley gave generously of his time and provided seasoned advice in guiding the *Law Journal* staff to a successful symposium issue. We are grateful for his help.

Mark C. de St. Aubin
Symposium Editor

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TIME LIMITATIONS WHICH BAR CLAIMS IN MISSISSIPPI WORKERS' COMPENSATION: A RE-EXAMINATION

John R. Bradley[1]

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[1] Professor of Law, University of Mississippi School of Law, where he teaches courses on workers' compensation, corporations and contracts. Professor Bradley received a B.A. degree with special distinction from Mississippi College and a J.D. degree with distinction from the University of Mississippi.

In an earlier piece on time limitations, I pointed out several instances in which the case law contained both statements and results seriously at odds with what seems to be sound judicial policy in interpreting the workers' compensation statutes. *See* John R. Bradley, "Time Limitations Which Bar Claims and Further Claims for Medical and Disability Benefits," WORKER'S COMPENSATION PRACTICE AND PROCEDURE (November 1989), published by Mississippi College School of Law Office of Professional Services. This current article reexamines the source of those and other limitations rulings. While the two pieces largely coincide on where the disharmony lies, this article suggests that some of the court's "rules" described in the earlier piece are contradicted by other, better reasoned opinions. It also suggests that those opinions often contain better approaches to the problem areas.

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I. INTRODUCTION

This article undertakes an explanation and analysis of time limitations which bar claims in Mississippi workers' compensation law. Along the way, it points out instances of surprising and often unfair results, wrong turns and assumptions that led to some of those results, and solutions in existing statutes and decisions which offer better and fairer approaches at the key points of tension. Here is a precis of the major points.

> 1. Both the one-year statute and the two-year statute apply to claims for benefits. Nothing in the statute says that either displaces the other. They exist side-by-side as is common in workers' compensation. A claim can be barred only by the later-expiring period.
> 2. When only medical benefits (as opposed to disability benefits also) have been provided, notice must be given to the worker by Form B-31 in order to set the one-year period in motion. In this respect, a "medical only" case is governed by the same statutes and rules that apply when disability benefits have been provided.

3. The all-important "notice" contained in the Form B-31 should be designed realistically to contain a message to the worker of the actual meaning and consequences of the "form."

A. *Provisions, Principles and Problems*

Two different provisions in the Mississippi Workers' Compensation Law[2] impose important time limitations which can bar claims for benefits. The two-year statute, which appears in section 71-3-35(1),[3] can bar claims for medical services, disability income benefits and death benefits. The one-year statute of section 71-3-53[4] can bar claims for medical services disability

---

[2] MISS. CODE ANN. §§ 71-3-1 to -119 (1972 & Supp. 1992).

[3] *Id.* Section 71-3-35 reads:

> (1) No claim for compensation shall be maintained unless, within thirty (30) days after the occurrence of the injury, actual notice was received by the employer or by an officer, manager, or designated representative of an employer. If no representative has been designated by posters placed in one or more conspicuous places, then notice received by any superior shall be sufficient. Absence of notice shall not bar recovery if it is found that the employer had knowledge of the injury and was not prejudiced by the employee's failure to give notice. Regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made and no application for benefits filed with the commission within two years from the date of the injury or death, the right to compensation therefore shall be barred.
>
> (2) If a person who is entitled to compensation under this chapter is mentally incompetent or a minor, the limitation for filing application for benefits shall not be applicable so long as such person has no guardian or other authorized representative, . . . or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.
>
> (3) Where recovery is denied to any person, in a suit brought at law or admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation upon filing application for benefits shall begin to run only from the date of termination of such suit.

MISS. CODE ANN. § 71-3-35 (1972 & Supp. 1992).

[4] *Id.* Section 71-3-53 reads:

> Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a

income benefits and claims for further death benefits to dependents.

The statutes are far from a model of clarity as to how each operates, and especially how they work in tandem. In this respect, they share the experience of many other states' workers' compensation laws. Some states resolved problems by amendments.[5] These particular provisions of the Mississippi

---

> determination of fact, the commission may, at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury; and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation in such manner and by such method as may be determined by the commission.

MISS. CODE ANN. § 71-3-53 (1972 & Supp. 1992).

[5] For example, in an early decision that the time limitation statute barred a claim for more medical services, the court noted that "[t]he provision of the compensation act of Florida as to limitation on the filing of a claim for compensation for disability, is almost identically like the Mississippi statute." Trehern v. Grafe Auto Co., 100 So. 2d 786, 788 (Miss. 1958). However, the Florida time limitations provisions changed over time, so that now Florida Statute Annotated § 440.19 contains detailed, separately-stated two-year provisions for disability income claims in § 440.19 (1)(a); for medical benefits in § 440.19 (1)(b); and for death claims in § 440.19(1)(d).

The statutory derivation shows that the 1935 original one-year provision was lengthened to two years in 1947 (1947 Fla. Laws ch. 23908 § 1); to three years in 1955 (1955 Fla. Laws ch. 29778, § 4); restored to two years in 1957, but the time when the period began to run was changed to the later of the last payment of compensation or medical (1957 Fla. Laws ch. 57-192, § 1). In 1979, the provisions were substantially rewritten in roughly the current form.

In Ken Lones Landscaping Inc. v. Tucker, 382 So. 2d 1368 (Fla. Dist. Ct. App. 1980), a worker was injured on July 3, 1974; received medical benefits at that time; received further medical treatment May 13, 1976, and surgery in July of 1977, all from the July 1974 injury. He was unable to work from July 26, 1977, to November 16, 1978. His claim for disability benefits was filed at some point after the 1977 surgery. In ruling the claim not barred by time, the court described the applicable Florida statutory provision of the then-current version of § 440.19(1)(a) as saying, "the statute of limitations for a workers' compensation law remain as originally enacted in 1948,[6] never having been amended for clarity or to change case law, although the court has invited a change.[7]

Because the statutes lack clarity, precision and thoroughness, it was left to the Mississippi Supreme Court to work out from these vague statutes a rudimentarily functional program of time limitations. This was done through a series of cases beginning in 1955 and continuing almost yearly to the present.

On one level, the case-law solution is basically workable. However, the solution can be regarded as workable only if one is willing to accept jarring instances in which workers whose claims clearly arise from work injuries find that their prompt claims are barred by one or the other of the two statutes. Seen from the vantage point of a worker whose claim for a work injury is defeated by a technical feature of the law without regard to the merits, one must ask a series of serious questions about whether the time limitations rules are workable or broken. To the extent they are broken, the court which was required to craft the workings of the rules in the first place should fix them. For starters, here are questions dealing with both the fundamental issues and with details on which the outcomes depend.

1. Is there a compelling reason that the passage of time should deny an injured worker a hearing on the merits to claim the benefits promised by the Workers' Compensation Law, benefits promised in exchange for taking away many of the tort law rights of recovery?[8]

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claim is two years after either (a) the date of accident or (b) the last payment of compensation benefits or (c) the last remedial medical treatment furnished by the employer." *Ken Lones Landscaping, Inc.*, 382 So. 2d at 1370.

[6] 1948 Miss. Laws ch. 354 §§ 12, 21.

[7] *See* Barr v. Conoco Chemicals, Inc., 412 So. 2d 1193, 1196 (Miss. 1982) (suggesting that legislature, not court, could alter statutes of limitations).

[8] MISS. CODE ANN. § 71-3-9 (1972 & Supp. 1992) contains the "exclusive remedy" provision which is common in workers' compensation laws. In most instances, it restricts the worker to the limited statutory benefits of workers' compensation and gives tort immunity to the employer. The operative statutory language says:

> The liability of an employer to pay compensation shall be exclusive and

2. When the statute is not clear on the time limitations, are the statute's other mandates of benefits for injured workers faithfully carried out by rules which bar claims by the *shorter of the two* statutory periods rather than allowing *both periods to run* the course?[9]

3. When the statute calls for "notice" and an "opportunity to be heard" before closing a case, is actual knowledge imparted to a worker that all rights will be lost by one cryptically written sentence on the bottom of the Form B-31 and by its repetition alongside two other ambiguous sentences on the reverse side of the form?[10]

It is well known that from the year 1623 lawmakers have chosen to place time limitations on the exercise of many legal rights which require use of a court or other forum such as the administrative agency customarily used in workers' compensation.[11] That is, the law normally imposes time limitations which can result in a legal technicality defeating an otherwise meritorious claim. Historically, we have justified such a result

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> in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death . . . .

Id. A large body of case law develops numerous facets of the exclusive remedy doctrine, including (1) intricacies of who in addition to the employer gets tort immunity (*see e.g.*, Morris v. W. E. Blain & Sons, Inc., 511 So. 2d 945 (Miss. 1987); Brown v. Williams, 504 So. 2d 1188 (Miss. 1987); Doubleday v. Boyd Constr. Co., 418 So. 2d 823 (Miss. 1982); (2) the propriety of taking away a common law right when workers' compensation operates to give a particular person nothing in exchange (*see, e.g., Morris*, 511 So. 2d at 945); (3) a tort immunity exception for a wilful and malicious act (*see, e.g.*, Miller v. McRae's, Inc., 444 So. 2d 368 (Miss. 1984)

[9] *See* discussion *infra* pp. 543-63, 586-89.

[10] *See* discussion *infra* pp. 38-41, 60-64 and 75-81 (involving §§ 71-3-37(7), -53, Mississippi Workers' Compensation Commission Procedural Rule 17 and its Form B-31, and other considerations).

[11] *See generally* Patrick J. Kelley, *Statute of Limitations in the Era of Compensation Systems: Workmen's Compensation Limitations Provisions for Accidental Injury Claims*, 1974 WASH. U. L.Q. 541, 545-51 (1974) (discussing the origins and purposes of limitation of actions); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177-78, 1185-86 (1950) (same). The Limitations Act of 1623 in England became the precedent in common law jurisdictions for limiting the time for filing claims.

as being based on one of three different reasons. One basis is that the rule, transposed into the workers' compensation context, guards against an injured worker sleeping on her rights by requiring relatively prompt action as evidence that there really is a need for formal action to award benefits. Secondly, a worker should not delay and allow a claim to become so stale that the evidence has become obscure or problematical by the passage of time so that the opportunity for a fair resolution has been diminished substantially. Finally, a worker should not be allowed to press a claim so late in the day that the employer or insurance carrier would be shocked out of a justified "repose" from having assumed that any and all liability had been laid to rest earlier. At some point, an employer is entitled to know once and for all the extent of its liability.

In the design and application of rules which govern the operation of time limitations statutes, inevitably there are choices to be made. For example, one choice in workers' compensation is whether the time limitation clock begins at the later time of when a person knows of a disabling injury or at the earlier time of the occurrence of the accident which led to the harm discovered later. The choice should be made in view of the language of the statutory provision (general or precise), the overall aim of the body of law from which the right arises, and finally by how the potential choices are influenced by the above-stated justifications for having a technical rule which can rise above the merits of a claim. In workers' compensation, a potent factor is the overall aim of the body of law giving rise to the claim. This is remedial legislation. Historically, it has been construed so as to carry out the underlying purposes of the act which is to provide benefits for injured workers.[12] Liberal construction to promote the law's beneficial purposes is a hallmark of workers' compensation.[13] That "doubtful cases should be resolved in favor of the worker" is a familiar tenet of worker's compensation. It is a principle which applies to resolving interpretation of the statute[14] and to findings of fact.[15]

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[12] *See, e.g.*, Mutual Implement & Hardware Ins. Co. v. Pittman, 829, 59 So. 2d 547, 549 (Miss. 1952) (injury at work from assault by co-worker is compensable under broad and liberal construction of act).

[13] *See, e.g.*, L.B. Priester & Sons, Inc. v. Bynum, 142 So. 2d 30, 31 (Miss. 1962) (concluding that liberation construction was proper even after 1960 amendment specified that act be "fairly construed").

The case-law solution to the statutory puzzle of time limitations is characterized above as "basically workable." But its workings frequently come at a high price to the stated purposes of the statute. Moreover, the "solutions," when tested by the major underlying policies, too often seem to be a complete stranger to these guiding principles.

This is not to say that the court has been asleep at the switch. Rather, it is that the court has not succeeded in making a silk purse out of the sow's ear handed to it by the 1948 legislature. While there are a few instances in which this paper criticizes specific decisions, that is not a significant tenor of this piece. Instead, that the court even patched together a gunny sack out of what the statute gave it to work with is commendable. But this coarse sack has not proved good enough to assure fairness. We may never get a silk purse, but we should work at getting closer to the goal of fair results for all concerned and steadfastness to the guiding principles.

Perhaps the best evidence of these flaws are judicial remarks that something better is needed. In one instance, a circuit court judge, confronting the issue of whether the law barred a claim which was undoubtedly from a work injury to a worker who had endured the pain for a commendably long time before succumbing to the need for help, concluded that any "interpretation of the law resulting in the failure of persons such as Odell Mitchell to receive compensation for a latent medical injury would indeed be unjust."[16] But, the trial judge's ruling that the claim was not barred was reversed because the two-year period waited for no such man.[17] More poignant is the court's realization in 1982[18] that the aspirations expressed in its 1958 and 1959 decisions to protect against unfair time-bars had boomeranged, as is shown in the following sequence.

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[14] *See, e.g.*, Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 892 (Miss. 1980) (on agreed facts, question of whether injury arose "out of and in the course of employment" as required by statute was question of law and if doubtful should be resolved in favor of compensation).

[15] *See, e.g.,* Sperry-Vickers Inc. v. Honea, 394 So. 2d 1380, 1385 (Miss. 1981) (unreachably high standard of medical evidence of causal connection would defeat beneficent purpose of act).

[16] Circuit Court Order, Record at 133, Benoit Elevator Co. v. Mitchell, 485 So. 2d 1068 (Miss. 1986) (No. 55,344) (merely because the West Publishing Co. reporter says "Benoist" does not change the fact that "Benoit" Elevator Co. was the

In the early case of *Gibbs v. Bass*,[19] the court saw the looming injustice of a badly disabled worker being deprived of medical services promised by the statute. The court offered assurance lest the claimant be

> unduly fearful in regard to his future rights for medical services and supplies becoming barred at the time of the expiration of the [one-year] statute of limitations . . . since this statute will be tolled during such period as the appellees shall continue to furnish such medical services and supplies, during such period as the nature of the injury or the process of recovery may require.[20]
>
> [U]ntil there shall have been a default in the furnishing . . . of the medical services and supplies . . . , the statute of limitations . . . would not begin to run.[21]

But this assurance only proved to be lip service. Twenty-three years later, the court ruled that another worker's claim for a timely replacement of the worn-out artificial leg was time-barred even though claim was asserted very soon after the need for the replacement arose.[22] The court saw clearly the trap for the unwary which it had built by its 1958 ruling in *Trehern v. Grafe Auto Co.*[23] and not alleviated despite it assurance in 1959 in *Gibbs* that such a claimant had no need to be

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employer and the party in the case.)

[17] Benoit Elevator Co. v. Mitchell, 485 So. 2d 1068, 1069-70 (Miss. 1986). The court ruled that the two-year period began running more than two years before the claim was filed. It was not delayed by the "discovery" or "latent injury" doctrine. *Id.*

[18] Barr v. Conoco Chemicals, Inc., 412 So. 2d 1193, 1196 (Miss. 1982).

[19] 116 So. 2d 542 (Miss. 1959).

[20] *Gibbs*, 116 So. 2d at 544-45.

[21] *Id.* at 544.

[22] Barr v. Conoco Chemicals, Inc., 412 So. 2d 1193, 1195-96 (Miss. 1982).

[23] 100 So. 2d 786, 787-88 (Miss. 1958).

"apprehensive"[24] about a statute of limitations which would bar his right to needed medical services and supplies, for after all the statute promises the benefits for as long as needed. The fact that the artificial leg, which Barr needed after his work injury caused an amputation, would have to be replaced every two or three years was readily acknowledged. But the legal technicality of a time-bar defeated the injured-worker's right even though the claim was filed promptly after the need arose. The court bemoaned the result and articulated what it regarded as a better rule than the existing case-law solution.[25] But, strangely, the court said that only the legislature could change the rule that the court earlier had crafted from the vague statute.

B. *Summary of the Rulings*

The case law has produced an interaction of the two statutes.[26] In some important particulars as to the two-year statute, the case law rulings stand in conflict, as discussed below. In other important particulars, the one-year rulings create results regarded by the courts as unfair. Thus, ambiguity and tension stem from the case-law solutions. Here is a summary of the rulings.

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[24] *Gibbs*, 116 So. 2d at 544.

[25] *Barr*, 412 So. 2d at 1196. The court's preferred solution of having the one-year period start running when the employer declines to furnish benefits is just what the court itself announced in *Gibbs* in 1959. *Id.*

[26] The court repeatedly has called each provision a "statute of limitations." *E.g.*, City of Kosciusko v. Graham, 419 So. 2d 1005, 1008 (Miss. 1982) (both provisions are "statute of limitations"); Martin v. L. & A. Contracting Co., 162 So. 2d 870, 872 (Miss. 1964) (two-year limitation); H. C. Moody & Sons v. Dedeaux, 79 So. 2d 225, 229 (Miss. 1955) (one-year limitation). On occasion the court has foregone such a characterization. *E.g.*, Trehern v. Grafe Auto Co., 100 So. 2d 786, 787, 789 (Miss. 1958) ("period of limitation").

The Mississippi Workers' Compensation Commission's Procedural Rule 4 provides that "[a]ll affirmative defenses such as intoxication of the injured employee, willful intent to injure himself or another, *statute of limitations*, lack of notice, etc. must be pled. Unless so pled they shall be deemed waived" (emphasis added). A prior sentence of the Rule calls for an employer or insurance carrier to use a Form B-5, 22 for its response to a claim, and says "there shall be attached, if the employer or carrier so desires, any affirmative defense." *Id.* A statute of limitations defense is also treated as an affirmative defense in MISS. R. CIV. P. 8(c).

1. A claim must be filed within two years after the injury or the claim for any further medical benefits and for disability income benefits is barred. However, if there is a payment of disability income benefits within the two years, that payment affects the operation of the two-year statute, either by erasing the statute so that it is no longer applicable (as some cases say), or by delaying the running of the two-year period (as other cases say).

2. Under the latter interpretation, the two-year period would begin running when disability payments end. Both the two-year period and the one-year period could be running at the same time, and a claim would be barred when the later of the two expired.

3. Under the former interpretation, the disability payment causes the two-year statute to become inapplicable. The one-year statute then becomes the governing provision. This means the one-year period could expire before the two-year period would have expired. A properly filed B-31 following the most recent payment for disability income benefits or medial services is necessary to start the running of the one-year period. A claim for additional benefits (medical or disability) is not time-barred within the one year after the B-31 was filed. A claim for additional benefits (medical or disability) is time-barred if it arises after the expiration of the one-year period. However, any further payment of benefits or furnishing or authorizing of medical services within the one year stops the running of the statutory period of limitations. A new one-year period will begin running only upon the proper filing of a B-31. At any point, failure to file the B-31 properly means that the one-year statute does not begin running.

This summary combines the statutory language and the results of the case-law struggle with the time limitation problem in broad-brush fashion. A few occurrences are left out of the summary. The application of the two-year statute to death benefits is described separately in a section below.[27] Exceptions, such as a savings clause and tolling by some type of estoppel, are dealt with in the text but not in the summary. Also, described separately are situations for which there are neither court rulings nor statutory clarity. The application of the one-year statute to further claims for death benefits would seem to follow the same pattern as for medical and disability benefits, but this has not been a subject of litigation.[28]

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[27] *See infra* notes 23-26 and accompanying text.

C. *Notice to Employer Within 30 Days of Injury*

A related topic, which also appears in the code section with the two-year statute, is that of prompt notice to the employer of injury as opposed to a formal filing of a claim. The first sentence of section 71-3-35(1) says that a claim cannot be maintained unless notice of the injury is received by the employer within 30 days.[29] The section goes on to say that so long as the employer, at some point obtains knowledge of the injury, absence of the thirty-day notice will not bar the claim unless the employer is prejudiced by failure to receive notice from the worker.[30] This feature gives the notice provision its dominant character.

The provision has not been interpreted to impose a technical requirement that the employee give a formal notice within 30 days of injury. Instead, the court's rulings have construed any requirement of notice as being met if a representative of the employer has knowledge that the worker has an ailment. At the same time that the court has set this easy-to-meet test of notice, it has also recognized a hard-to-meet test of prejudice to the employer in case the easy-to-meet test has not been satisfied. This is in accord with the statutory design of not depriving a worker of the right to be heard unless there is a compelling reason to do so.

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[28] *See* Hill v. United Timber & Lumber Co., 73 So. 2d 247 (Miss. 1954) ("reopening" under one-year statute was ordered by court for consideration of newly discovered evidence; reopening was for purpose of new decision between competing claimants, each seeking to prove death claim as widow).

[29] MISS. CODE ANN. § 71-3-35 (1972 & Supp. 1992).

[30] *Id.*

Early on, the court, citing the norm in workers' compensation law, adopted the attitude that, "[t]he law looks with disfavor on strained and technical interpretations of statutes regarding notice of injury; and even in cases where no timely notice was given, the tendency is to temper the literal harshness of statutory bars by permitting the recognition of various excuses, and permitting waivers and exceptions."[31] For a reason both simple and profound the court also noted that technical requirements of time limitations should not be raised up to defeat a worker's right to be heard. Specifically, the court stated that "[i]t is common knowledge that many workmen covered by the act know little of their rights and duties under the act."[32]

In reaching these conclusions, the court has discerned that the statute, after stating a requirement of notice, establishes two separate bases for backing off the requirement. In its rulings that the claims were not barred by the thirty-day notice provision, the court has nearly always found the existence of actual knowledge chargeable to the employer coupled with lack of prejudice to the employer from not having formal notice.[33] This is the mandate of the third sentence of section 71-3-35(1) which states, "[a]bsence of notice shall not bar recovery if it is found that the employer had knowledge of the injury and was not prejudiced by the employee's failure to give notice."[34]

The other basis for the result of no bar is a finding that no conspicuous poster designated the representative to be notified of injury along with a finding that a workplace superior had notice of the injury. In this mode, knowledge is regarded as notice, and lack of prejudice from not having formal notice is not a statutory element for the result of no bar.

The court's interpretations, true to the statutory language and design, have made the thirty-day notice provision of virtually no significance in the actual operation of workers' compensation law. The major elements of this result are as follows.

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[31] Port Gibson Veneer & Box Co. v. Brown, 83 So. 2d 757, 759 (Miss. 1955).

[32] *Id.* at 759-60.

[33] *Id.* The employer has the burden of proving prejudice and absent such proof, a conclusion of no prejudice is automatic. *Id.*

[34] MISS. CODE ANN. § 71-3-35 (1972 & Supp. 1992).

1. There is no requirement that a formal "notice" need be given within the thirty-day period. Actual knowledge of the injury by a workplace superior normally satisfies the notice requirement.[35]

2. When knowledge is charged to the employer, there is no additional requirement that the employer must also know within 30 days that the worker regards it as a work injury.[36]

3. If the injury is latent, gradually developing or "cannot

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[35] Chronologically, the principle was established in a series of cases in the 1950's. *See* Ingalls Shipbuilding Corp. v. Byrd, 60 So. 2d 645, 651 (Miss. 1952) (earliest case recognizing knowledge of foreman as sufficient); Pepper v. Barrett, 82 So. 2d 580, 581-84 (Miss. 1955) (concluding employer had knowledge when worker promptly told foreman of injury and foreman visited ailing worker later); Pearl River Tung Co. v. Estate of John, 83 So. 2d 95, 96 (Miss. 1955) (stating fact that foreman drove worker to hospital constituted employer's actual knowledge); Port Gibson Veneer & Box Co. v. Brown, 83 So. 2d 757, 760 (Miss. 1955) (declaring foreman's knowledge was notice to employer and not negated by close relationship between worker and his stepfather foreman); Ingalls Shipbuilding Corp. v. Dickerson, 92 So. 2d 354, 358-59 (Miss. 1957) (finding employer had knowledge when injured worker was treated at work in first-aid station and foreman visited worker in hospital within thirty-day period); Houston Contracting Co. v. Reed, 95 So. 2d 231, 233 (Miss. 1957) (concluding sufficient "notice" to employer when worker told superior at work of his injury); Bush v. Byrd, 108 So. 2d 211, 212-13 (Miss. 1959) (stating that employer and superintendent knew of worker's death at once).

When the employer had posted no notice of how to report work injuries, knowledge of a workplace superior of injury has the same effect as "notice." Teague v. Graning Hardwood Mfg. Co., 117 So. 2d 342, 343-44 (Miss. 1960).

[36] *See, e.g.*, Central Elec. & Mach. Co. v. Shelton, 220 So. 2d 320, 324 (Miss. 1969) (expressly stating this principle when foreman knew of ailment the next day, worker obtained group insurance benefits and no compensation claim was made until much later); *see also* Havens v. Natchez Times Publ. Co., 117 So. 2d 706 (Miss. 1960). Six weeks after *Havens*, in Davis v. Clark-Burt Roofing Co., 118 So. 2d 774 (Miss. 1960) the court told us that the employer knew early on that Havens was injured in an auto accident, but did not know until 19 months later when the formal claim was filed that the worker regarded the broken leg as a work injury. *Id.* at 775. The principle was followed by the court in earlier cases including *Byrd*, 60 So. 2d at 651 and *Dickerson*, 92 So. 2d at 358-59; *accord* Walker Mfg. Co. v. Pickens, 206 So. 2d 639 (Miss. 1968) (foreman knew of ailment promptly in August; worker agreed to use health insurance; then in December filed workers' compensation claim); Davis v. Clark-Burt Roofing Co., 118 So. 2d 774, *modified on reh'g*, 119 So. 2d 926 (Miss. 1960) (foreman knew of back ailment within few days; did not know of work connection until formal claim was filed about 60 days later).

with reasonable certainty be recognized at first as compensable," the thirty-day period does not begin to run until "the time the employee acquires knowledge of a compensable disability"[37] as a result of the work injury. This means two things. The slow trigger on beginning the thirty-day period stems from the precise statutory language that the thirty-day period does not begin to run at the date of the "accident" but only at the time of "injury."[38] Also, the worker is charged with knowledge of an "injury" only when the worker "as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury."[39] Thus, during the time a worker either has no disability or is unaware of the connection between the work and the ailment, the thirty-day clock is not ticking.

4. In order for a claim to be barred by failure to give a formal, early notice, the employer must prove that the lack of notice is prejudicial. That the statute places this burden on the

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[37] *See, e.g.*, Pope Co. v. Wells, 204, 92 So. 2d 370, 372 (Miss. 1957) (burning sensation on skin occurred October 15; twice saw physician for rash; continued to work until March 14 when open sore caused physician to prescribe bed rest and medication). To the same effect is the earlier case of *Byrd*. The court never said whether the knowledge of the foreman that the worker left work sick on April 27 was notice, or whether notice was timely because the foreman was told in early June by the worker that the surgery of May 2 and 3 was made necessary by the work. *Byrd*, 60 So. 2d at 649-50. *Byrd* is the earliest ruling on the 30-day notice provision, and the very tenor of its imprecision is a clear message of the courts' distaste for a rigid requirement of notice.

As to when the 30-day period begins, the court later said that if a foreman's knowledge of the stroke that day and the personnel director's knowledge within 10 days were not ample as "notice" within 30 days, the period would not begin running at once because "neither the employee nor his wife had any knowledge of the probable compensable character of the injury until they conferred with attorneys." *Walker Mfg. Co.*, 206 So. 2d at 640. But, attorney's advice as the date for starting the time period was specifically rejected when the two-year period was in issue in Quaker Oats Co. v. Miller, 370 So. 2d 1163 (Miss. 1979); *see infra* notes 213-224 and accompanying text. While a possible distinction between the two is noted in Tabor Motor Co. v. Garrard, 233 So. 2d 811, 816 (Miss. 1970) and in Thyer Mfg. Co. v. Keys 235 Miss. 229, 237, 108 So. 2d 876, 879 (Miss. 1959), it seems that the *Pope Co.* formulation as quoted coincides for all practical purposes with the two-year results as discussed herein.

[38] *See* MISS. CODE ANN. § 71-3-35 (1972 & Supp. 1992).

[39] *Pope Co.*, 92 So. 2d at 372.

employer means there is a presumption that lack of notice within thirty days is neither prejudicial nor legally consequential.[40]

5. In order to show prejudice from failure to receive notice from the worker within thirty days, the employer must show a substantial hindrance in its opportunity to investigative the claim on matters such as work connection and extent of disability.[41]

6. In one situation of a death claim, the court held the thirty-day notice provision to be inapplicable.[42] The death claim was filed in 1964, alleging that death resulted from work injuries (heart attacks) in 1958 and 1960. The employer neither received notice from the worker nor had knowledge otherwise of the alleged work injuries. The lack of notice within 30 days of the injury did not bar the death claim because the claims (injury, on the one hand, and death, on the other) are two separate claims.[43] If there was a procedural lapse by the worker as to the *worker's* claim for injury, it did not adversely affect the *dependents*' claim for death benefits.[44]

Since the statute's inception in 1949, this writer knows of only one instance in which the court ruled a claim barred by the thirty-day notice provision. In that case[45] the court said that a prior federal administrative decision that the federal law's thirty-day notice provision barred a claim under the Longshoremen's and Harbor Workers' Compensation Act was res judicata to the worker's later-filed claim for benefits under the Mississippi Worker's Compensation Law. The court's ruling was only on the procedural point, never discussing the substantive operation of the Mississippi statute and case law. Indeed, on the substantive operation the administrative judge, the commission and the circuit court had found no prejudice to the employer when the worker learned of his asbestosis ailment on June 16, 1979, and filed a claim on August 12, 1980.[46] The court did not address that finding of fact, but instead deferred to the prior federal ruling, which applied a similar but not identical statute. The tenor of this result is so out of harmony with the prior Mississippi workers' compensation decisions that it seems aberrational.

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[40] *See, e.g., Havens*, 117 So. 2d at 709 (actual notice that broken leg from auto accident was regarded by worker as work injury came 19 months after injury when formal claim was filed; no prejudice proven by employer). In all of the earlier cases cited above, except *Houston Contracting Co.*, the court noted the absence of proof of prejudicial effect.

[41] Though not articulated in the cited cases, this statement seems to be an accurate description of the employer's burden of showing why absence of notice should deprive the worker of an opportunity to have the claim heard.

[42] Ingalls Shipbuilding Corp. v. Harris, 187 So. 2d 886 (Miss. 1966).

[43] *Id.* at 888.

[44] *Id.* at 887-88. No point was made of whether the death claimants' gave notice within 30 days of the 1963 death. Their formal claim was filed 17 months after the death. *Id.* The statute does not mention a notice period after death; it only mentions injury. In many other places the statute says "injury or death," including the two-year provision in MISS. CODE ANN. § 71-3-35(1) (1972) and the general mandate for benefits in MISS. CODE ANN. § 71-3-7 (1972).

[45] Ingalls Shipbuilding Division v. Parson, 495 So. 2d 461 (Miss. 1986).

II. The Two-Year Limitation

A. *The Two-Year Statute as a Bar*

The two-year statute of limitations is found in the last sentence of section 71-3-35(1). Although not stated in the form typical of a statute of limitations, it operates as it reads:

> [R]egardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made and no application for benefits filed with the commission within two years from the date of the injury or death, the right to compensation therefor shall be barred.[47]

The statute's difficult syntax can be obviated by this restatement:

> If a claim has not been filed within two years after the injury (or death claim within two years after death), the claim is barred unless there has been a payment of disability income benefits or nonburial death benefits.

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[46] *Id.* at 462-64.

[47] MISS. CODE ANN. § 71-3-35(1) (1972 & Supp. 1992).

The two-year statute can operate to bar a claim for disability income benefits, for medical services and for death benefits.

B. Bar to Death Benefits

The two-year statute, by its terms, can bar "the right to compensation." "Compensation" is defined as, "the money allowance payable to an injured worker or his dependents as provided in this chapter, and includes funeral benefits provided therein.[48]

The two-year period begins at death, not at the time of an earlier injury which causes death.[49] Notwithstanding the fact that the claim of the death beneficiary is derivative from the decedent's status as an employee, the statute provides for a death claim as a separate item from the claim of the employee for injury.[50] For most purposes the two claims have separate status.[51]

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[48] *Id.* § 71-3-3(j). Death benefits are provided in § 71-3-25. The section is aided by definitions of those named in § 71-3-25 as entitled to benefits in case of death of a worker from a work injury; *see id.* § 71-3-3(l) (child); (m) (parent); (n) (surviving spouse); (o) (adopted) and (q) (added presumption of dependency for some). For this purpose, there are two classes who can receive death benefits: (1) those entitled by status alone and (2) those entitled by a combination of status and proof of dependency. For example, a surviving spouse who was a legal wife or husband of the worker and living with the worker at the time of death is entitled to death benefits by status alone. Similarly, an unmarried child under age 18 is entitled to death benefits by status alone, which is to say that the person is entitled to the benefits by statute without reference to whether the person was financially "dependent" on the worker. Section 71-3-25(g) says these people are presumed dependent. Thus it appears that any person entitled to death benefits is a dependent, either by statutory presumption or by proof. Hence, theirs are claims which can be barred by the provision in § 71-3-35(1).

[49] Ingalls Shipbuilding Corp. v. Harris, 187 So. 2d 886, 887 (Miss. 1966). The worker received no benefits and filed no claim for the injuries alleged in the death claim to have occurred in 1958 and 1960. After his death in 1964, a death claim was filed, contending the death was connected to the earlier work injuries (heart attacks). *Id.*

[50] MISS. CODE ANN. § 71-3-35(1) (1972 & Supp. 1992).

[51] *Cf.* Proctor v. Ingalls Shipbuilding Corp, 183 So. 2d 483 (Miss. 1966) (holding that prior ruling against worker on his injury claim was res judicata against dependents' death claim based on same injury); Knox Glass Co. v. Evans, 246 So. 2d 89 (Miss. 1971) (same). Though this defense argument succeeded, the defense

By the same token, death claims running in favor of different people are not necessarily affected in the same way by the limitations period. Nor are all parts of a death claim necessarily treated the same. In *Stanley v. McLendon*,[52] the widow's claim was time-barred but the claims of two minor children were not barred because of the savings clause described below. The claim for the $100 penalty for employer's failure to report the death within 10 days as required by statute was upheld as an award for the minors. Although ruling the widow's death claim barred, the commission awarded the widow the statutory lump sum payment, and the employer did not appeal this award. The attorney referee had made an award for funeral expenses, and the commission struck that award as being a moot issue since the evidence showed that the employer had already paid the funeral expense.[53]

Sections 71-3-35(2) and (3) contain savings clauses which delay the beginning of the two-year period.[54] The former undertakes to protect a claimant who is under a disability of minority or mental incompetence. The time period begins running only if a guardian or other personal representative[55] is duly appointed, or, in the absence of a guardian, when the claimant "becomes of age." The value of the savings clause for the mentally incompetent was brought into question in a

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position came late to embracing res judicata treatment. For example, in a prior death claim case, the employer, who earlier had lost the controverted injury claim by the worker, *contended exactly the opposite*: (a) dependent must prove anew that a work injury had occurred (in addition to connection between injury and death and (b) the transcript of worker's testimony in the injury case could not be admitted as proof of injury in the death claim because of no identity of the parties in the two cases. The court, without discussing res judicata, simply approved the commission's allowing the transcript admitted as evidence. Prentiss Truck & Tractor Co. v. Spencer, 87 So. 2d 272, 275-76 (Miss. 1956).

[52] 70 So. 2d 323 (Miss. 1954).

[53] *Stanley*, 70 So. 2d at 325.

[54] MISS. CODE ANN. § 71-3-35(2), (3) (1972).

[55] Because the death claim belongs to the individuals named in the statute as beneficiaries, the two-year period does not begin to run as to minor beneficiaries who have no guardian. U.S.F. & G. v. Fortner, 234 So. 2d 636, 638 (Miss. 1970). This is unchanged by the appointment of an administrator of the deceased worker's estate. The administrator who is not named as death claim beneficiary has no interest in that claim and does not represent the minors. *Id.*

nondeath case when the court affirmed a ruling of the Mississippi Workers' Compensation Commission denying protection of the savings clause to an injured worker with an IQ of 54 who claimed to be mentally incompetent.[56]

The latter savings clause starts the running of the two-year period at the termination of a tort or admiralty action when there was a successful defense that the exclusive remedy provision of the workers' compensation law precludes the maintenance of the action. This allows for the tort or admiralty action to be pursued without forfeiting the workers' compensation claim to a time bar.[57]

C. *Operation of the Two-Year Statute: Conflicting Explanations*

The operation of the two-year statute has not proved to be simple. Different factual circumstances interject varying factors which bear on how the provision works when the two-year statute is asserted as a defense. (1) The simplest circumstance is when no medical or disability benefits have been provided within two years after the injury. (2) Another is when both medical and disability benefits have been provided voluntarily.[58] (3) A third situation occurs when only medical benefits have been provided but not disability benefits. (4) The fourth factual circumstance involves variations on (2) and (3). These variations occur when a claim for further benefits is filed: within two years after the injury but more than one year after the most recent benefits; later than two years after the injury but within one year after the most recent benefits, or within two years after the most recent benefits; or more than two years after both the injury and the most recent benefits.

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[56] Shippers Express v. Chapman, 364 So. 2d 1097, 1100-02 (Miss. 1978).

[57] *Cf.* Pulliam v. Gulf Lumber Co., 312 F.2d 505, 510 (5th Cir. 1963) (applying analogous Mississippi statue, now MISS. CODE ANN. § 15-1-69 (1972), to "save" claim filed in Mississippi for Alabama workers' compensation benefits after Mississippi ruling that its workers' compensation law did not apply).

[58] *See* MISS. CODE ANN. § 71-3-37(1) (1972 & Supp. 1992). Section 71-3-37(1) mandates that such benefits shall be paid promptly and voluntarily ("without an award") unless the employer formally controverts by filing a notice of such with the Workers' Compensation Commission (as set out in § 71-3-37(4)). If benefits are paid pursuant to an award instead of voluntarily, this means an application of benefits was filed earlier and usually there is no unresolved question about its being time-barred. Not included is the unlikely occurrence of the payment of disability benefits but no medical benefits. Since a worker must miss more than five days work to be entitled to disability benefits under the provision of § 71-3-11, that would rarely occur without the need for medical services.

The lack of clarity in how the statute operates is evident in the *two different ways* the court has read and applied the provision. In the factual circumstance when voluntary disability benefits have been paid, the following issue is often presented: *Is a claim barred by the earlier expiring of the one-year and the two-year periods, or must both run the course before a claim is barred?* When voluntary benefits had been paid, the court's original ruling said a claim filed more than two years after injury was not barred because such payment suspended or interrupted the running of the two-year period.[59] When payment[s] stopped, the two-year period began running. Thirteen years later, without contradicting the 1964 ruling, the court again ruled that a claim was not barred but this time gave a different reason: the voluntary "payments tolled or erased the two-year statute of limitations."[60] To "toll" the statute often means to suspend for a time the running of the time period, as while one is under a legal disability,[61] outside the jurisdiction,[62] in certain military service,[63] or while another claim is being pursued.[64] But to "erase" the statute can mean that the statute is no longer applicable to bar a claim, as when a claim has been filed within the two-year period.

Either of these two different approaches could produce the same results—not time-barred—in either of the factual circumstances of the two cases. But they produce *opposite* results in a certain, different factual situation when the issue is whether a claim will be barred. At that point one must face a fundamental question: *When the statute is not clear on a time limitations issue, is the better rule to bar a claim by the shorter of the two statutory periods or to allow both periods to run the course?* A rational answer to the fundamental question will always help in determining how to apply the law to specific factual circumstances. When we turn this proposition around, we know that in the process of decision-making the explanation of a given result needs to be tested not only by the case at hand but also by the governing principles, so that the larger body of law will develop in harmony with those principles.

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[59] Martin v. L. & A. Contracting Co., 162 So. 2d 870 (Miss. 1964) (*see infra* notes 75-84 and accompanying text).

[60] Brown v. F.W. Woolworth Co., 348 So. 2d 136, 240 (Miss. 1977) (*see infra* notes 91-96 and accompanying text).

[61] *See, e.g.*, MISS. CODE ANN.§ 15-1-59 (1972 & Supp. 1992) (savings clause generally applicable to Mississippi statutes of limitations).

[62] *See, e.g.*, *id.* § 15-1-63.

[63] *See, e.g.*, 50 U.S.C.A. § 525 (West Supp. 1992) (Soldiers' and Sailor's Civil Relief Act).

[64] *See, e.g.*, MISS. CODE ANN. § 71-3-35(3) (1972 & Supp. 1992) (two-year workers' compensation statute does not run during pendency of injury suit against one who successfully asserts exclusive remedy provision of workers' compensation).

D. Bar to Disability Income Benefits

1. General Application

The two-year statute, by its terms, can bar "the right to compensation," "compensation" being defined in section 71-3-3(j) to include "the money allowance payable to an injured worker." This money allowance is the disability income benefits of sections 71-3-17,[65] 71-3-19,[66] 71-3-21,[67] and 71-3-23.[68]

2. When No Benefits Have Been Provided Before the Claim

In *Childs v. Mississippi Industries for the Blind*,[69] the worker filed a claim on February 2, 1962, for a respiratory ailment allegedly connected with the dust and fumes at the workplace. The worker claimed that the injury and disability occurred on July 28, 1960. Evidence showed that the worker was treated for the condition in 1957 and in 1958. The court affirmed the dismissal of the claim as time-barred based on the commission's finding of 1958 as being the date of injury.[70]

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[65] MISS. CODE ANN. § 71-3-17(a)-(c) (1972 & Supp. 1992). Section 71-3-17(a) provides for permanent total disability benefits; § 71-3-17(b) for temporary total disability benefits; and § 71-3-17(c)(1)-(24) and (26) for permanent partial disability benefits for scheduled member injuries and § 71-3-17(c)(25) for permanent partial disability for body as-a-whole injuries.

[66] *Id.* § 71-3-19. Rehabilitation benefit of up to $520.00.

[67] *Id.* § 71-3-21. Temporary partial disability benefits.

[68] *Id.* § 71-3-23. Benefits for temporary total disability from hernia.

[69] 184 So. 2d 872 (Miss. 1966), *overruled by* 233 So. 2d 811, 817 (Miss. 1970) (to extent that it is inconsistent with "discovery" rules regarding latent injuries).

If Childs suffered from a gradually developing or a latent injury, such a claim may not be barred under the later ruling of *Tabor Motor Co. v. Garrard*,[71] which expressly cited *Childs* as overruled to the extent inconsistent with the "discovery" rule as to when the two year period begins running.

The *Childs* case did not mention the effect of exposure at work later than 1958, even though employment continued from 1951 until 1961. The court also ruled against the worker's assertion that the employer was estopped from asserting the two-year statute due to its having induced the worker to delay filing the claim. The findings of fact did not support the worker's legal argument of being induced to delay the filing.[72]

Had there had been medical evidence that a later injurious exposure aggravated the condition, then that could have been a new injury to which a new two-year period would apply.[73]

3. *When Disability Benefits Have Been Provided*

The "summary,"[74] contains this description of the two-year statute:

1. A claim must be filed within two years after the injury

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[70] *Childs*, 184 So. 2d at 874. In Casey v. Deeson Cash Grocery, 246 So. 2d 534 (Miss. 1971), a claim, filed nearly five years after the worker knew of the injury, was barred by the two-year statute. *Id.* at 535. The worker obtained medical treatment, including surgery. Apparently, the employer told her there was no available insurance. The opinion never says whether benefits were paid but, this appears to be another case in which no benefits were paid and the two-year period expired to bar the claim. *Id.* at 535-36.

[71] 233 So. 2d 811, 817 (Miss. 1970) (*see infra* notes 185-193 and accompanying text).

[72] *Childs*, 184 So. 2d at 874.

[73] *Cf.* Brown v. F.W. Woolworth Co., 348 So. 2d 236, 240 (Miss. 1977) (*see infra* notes 91-96 and accompanying text).

[74] *See supra* pages 521-23.

or the claim for any further medical benefits and for disability income benefits is barred. However, if there is a payment of disability income benefits within the two years, that payment affects the operation of the two-year statute, either by erasing the statute so that is no longer applicable (as some cases say), or by delaying the running of the two-year period (as other cases say).

2. Under the latter interpretation, the two-year period would begin running when disability payments end. Both the two-year period and the one-year period could be running at the same time, and a claim would be barred when the later of the two expired.

3. Under the former interpretation, the disability payment causes the two-year statute to become inapplicable. The one-year statue then becomes the governing provision. This means the one-year period could expire before the two-year period would have expired.

4. Disability Benefits as Suspending Running of Two-Year Period

In the early case of *Martin v. L. & A. Contracting Co.*,[75] the court said that during the time disability benefits were being paid the two-year period did not run but was interrupted or suspended. The two-year period began running at the date of the last voluntary payment of disability benefits. A decision a year later in *Yazoo Manufacturing Co. v. Schaffer*[76] is consistent with this explanation.

Martin's injury occurred on March 17, 1959, in Florida. He filed a claim in Mississippi on December 27, 1962. Martin, a state resident, was hired in Mississippi by a Mississippi employer and was injured while temporarily in Florida. After emergency treatment in Florida, he was flown back to Mississippi. Disability income benefits were paid to Martin until October 15, 1961. The payments were reported to the Florida commission on a Mississippi form. No injury report was made to the Mississippi commission.[77] The $35 weekly disability rate was the same in both states. Although a Mississippi claims adjuster notified Martin in 1959 that a Florida insurance office was handling the matter, nearly all checks were mailed to him from a Mississippi office near his home. Martin was entitled to benefits under the Mississippi act, and the employer was entitled to have the "Florida" payments credited against the Mississippi obligation.[78]

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[75] 162 So. 2d 870, 872-73 (1964).

[76] 179 So. 2d 784, 791 (Miss. 1965).

Reversing the commission, the court ruled that the two-year statute did not bar the 1962 claim, because the two-year period did not begin running until the payments stopped on October 15, 1961. The court saw no logical reason to make a distinction between whether the payments were Florida or Mississippi payments. As to the employer's argument that the two-year statute barred the claim because it was filed more than two and a half years after the injury, the court was direct:

> The two-year statute of limitations did not begin to run until that date [of the last voluntary payment of compensation] . . . . [The statute] requires that there must be 'no payment of compensation' . . . . Therefore the statute did not run during the period of the payment of such compensation.[79]
>
> Claimant's conduct in refraining from filing a claim as long as he was receiving compensation, was reasonable . . . . Voluntary payment of compensation under these circumstances constituted a waiver of formal claim and rendered claimant's delay reasonable.[80]
>
> The most important factor here is that appellees voluntarily paid compensation to claimant, and this constituted a waiver of formal claim, estopping appellees from asserting the contrary.[81]

In order to answer the question of whether Martin's claim was barred, the court posed two questions about the operation of the two-year statute: *First*, what is the effect of the statute when no disability payments have been made? Although this issue was not directly before the court, the following explanation was that the two-year provision would take effect and could bar a claim. The court said:

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[77] *L. & A. Contracting*, 162 So. 2d at 871.

[78] *Id.* at 871-72.

[79] *Id.* at 872.

[80] *Id.* at 873.

[81] *Id.*

> First. The two-year limitation comes into effect only upon two conditions: (1) if no payment of compensation (other than medical treatment or burial expense) is made; and (2) if no application for benefits has been filed with the commission within two years from the date of injury or death.[82]

In its next sentence, the court pointed out that "[t]he first condition precedent to operation of this limitation statute does not exist here."[83]

Consequently, the court faced the *second question* which it was called on to answer: What was the effect on the statute when disability payments have been made? In answer, the court said:

> Payments of compensation were made by appellees, the employer and insurance carrier, up through October 15, 1961. The two-year statute of limitations did not begin to run until that date.[84]

The key to understanding exactly what the court did say and did not say is to understand that the answer given to the first question above was in response to the first question, not to the second question. The second answer was in response to the second question. The court's holding is misunderstood when one thinks the first answer is in response to the second question. Perhaps we can fault the court's writing, but more so we can fault our lack of precise reading in failing to note that there are two different answers to the two different questions.

The next year the court decided *Yazoo Manufacturing Co. v. Schaffer*,[85] its fourth case[86] on the two-year statute, and showed sure footing with a factual situation more complex than most. At issue was whether an amendment of October 31, 1962, to a claim filed on March 20, 1961, stated a claim that was barred by the two-year statute. Seeing that the record lacked a finding of whether the injury occurred on January 15, 1960, or on May 1, 1960, the court remanded for that finding. The court also announced the appropriate statute of limitations rulings, depending on when the injury occurred.[87]

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[82] *L. & A. Contracting*, 162 So. 2d at 873.

[83] *Id.*

[84] *Id.*

[85] 179 So. 2d 784 (Miss. 1965).

First, if the injury was found to be a new injury of May 1, 1960, the amendment filed October 31, 1962, was actually an application for benefits for that injury. Since no disability benefits had been paid as to a May 1 injury and no application for benefits had been filed within two years, the claim would be barred. The court quoted its observation from the "first question" of *L. & A. Contracting* on the statute's effect when no disability benefits have been paid:

> First. The two-year limitation comes into effect only upon two conditions: (1) if no payment of compensation (other than medical treatment or burial expense) is made; and (2) if no application for benefits has been filed with the commission within two years from the date of injury or death.
>
> . . .
>
> This is in accord with the analogous rule that payments of wages toll the limitation statute, if they were made on account of a recognition of compensation liability.[88]

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[86] Chronologically, *see* Thyer Mfg. Co. v. Keys, 108 So. 2d 876 (Miss. 1959) (to extent its inconsistent with "discovery" rules regarding latent injuries); *overruled by* 233 So. 2d 811, 817 (Miss. 1970); Modern Laundry v. Harrell, 150 So. 2d 409 (Miss. 1963) (same basis), *overruled by* 233 So. 2d 811, 817 (Miss. 1970). *See infra* notes 130-137 and accompanying text. In Welborn v. Joe N. Miles & Sons Lumber Co., 97 So. 2d 734, 736 (Miss. 1957), the court discussed the two-year provision. However, the court chose to "pass over that feature" and affirmed a dismissal of the claim for lack of medical evidence of causal connection between the work and the herniated disc. *Id.*

[87] *Yazoo Mfg. Co.*, 179 So. 2d at 791. While in most respects, the court seemed sure-footed, it was far from silver-penned. The one hundred twenty-eight word sentence at page 791 is an example of the difficult-to-understand explanations. *Id.*

[88] *Id.* at 790 (quoting *L. & A. Contracting*, 162 So. 2d at 872-73).

The last sentence of the quotation is, of course, the answer to the "second question" of the *L. & A. Contracting* discussion above. So this decision emphasizes that the court had two different answers to two different questions.

In *Yazoo Manufacturing Co.*, the court said further that if the May 1, 1960, injury was found not to be a new injury but instead a recurrence of the January 15, 1960, injury, a different ruling would be in order. "[I]f it is not a new claim, the two-year statute does not apply because the 'application for benefits (would have been) filed with the Commission within two years from the date of the injury . . . .' "[89] A claim for the January 15, 1960, injury had been filed on March 30, 1961, and its filing satisfied the filing requirement. What the court did not say is also instructive. The court did *not* say that the employer's payment of disability benefits in February of 1960 made the two year statute inapplicable. Instead, the court said such payment would "toll" the statute, quoting its ruling of a year earlier when "toll" was used to mean to delay or interrupt the running of the two-year period.[90]

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[89] *Id.* at 791 (quoting MISS. CODE ANN. § 6988-18(a) (1942), current version at § 71-3-35 (1972)).

[90] 74 BLACK'S LAW DICTIONARY 1488 (6th ed. 1990) says:

> Toll. *v.* To bar, defeat, or take away; thus to toll the entry means to deny or take away the right of entry.
>
> To suspend or stop temporarily as the statue of limitations is tolled during the defendant's absence from the jurisdiction and during plaintiff's minority.

BALLENTINE'S LAW DICTIONARY 1282 (3d ed. 1969) says, "TOLL. To suspend or interrupt the running of the statue of limitations." No edition of either *Black's* (1st 1891, 2nd 1910, 3d 1933, 4th 1951 or 5th 1970) or *Ballentine's* (1st 1930, 2nd 1948) includes "erase" or any similar term in defining "toll." Apparently, "erased" found its way into the law in a commentary on the meaning of *L. & A. Contracting* and *Yazoo Mfg. Co.* contained in VARDAMAN S. DUNN, WORKMEN'S COMPENSATION: A COMPREHENSIVE TREATISE ON THE WORKMEN'S COMPENSATION LAW OF MISSISSIPPI § 259, at 337 (2d ed. 1967). Ten years later, "tolled or erased" appeared in Brown v. F.W. Woolworth Co., 348 So. 2d 236 (Miss. 1977). *See infra* note 92 and accompanying text.

The court also noted in *Yazoo Mfg. Co.* the argument, but made no move to rule on what the result would be, that the language in H.C. Moody & Sons v. Dedeaux, 79 So. 2d 225, 229 (Miss. 1955), could be applied to bar the claim by the

5. *Disability Benefits as Making Two-Year Statute Inapplicable*

a. *"Tolled or Erased"*

The court decided *Brown v. F.W. Woolworth Co.*[91] thirteen years after *Martin v. L. & A. Contracting*, and ruled that the claim was not barred by the two-year statute even though it was filed more than two-years after the injury. But in the *Brown* opinion, the court added "or erased" to the language when commenting about the effect on the two-year statute of the employer's paying disability benefits, saying, "[s]uch payment tolled or erased the two-year statute of limitations . . . ."[92]

After the injury occurred on December 24, 1968, medical and disability benefits were provided. An unsigned B-31 was filed about the end of April 1969 but its defects prevented it from setting the one-year period in motion. The worker incurred more medical expenses in November 1970. The claim was filed on April 28, 1972.[93]

Although the attorney-referee ruled the claim was not barred, the commission decided the claim was barred by the one-year statute. The court reversed the commission and ruled that the one year was never set in motion because the B-31 was not filed properly to give notice to the worker.[94] That brought the court to the employer's cross-appeal, which asserted that the two-year statute applied: the claim of April 28, 1972, was not filed within the applicable two-year period. Recall that the injury was in 1968, and the disability and medical benefits were paid before the late April 1969, filing of the B-31. (Disability benefits were paid for three days of lost work.) Un-

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one-year provision even though it would not be barred by the two-year provision. *Yazoo Mfg. Co.*, 179 So. 2d at 788.

[91] 348 So. 2d 236 (Miss. 1977).

[92] *Brown*, 348 So. 2d at 240.

[93] *Id.* at 237-39.

[94] *Id.* at 239. Multiple defects prevented the Form B-31 from setting the one year in motion. *Id.* at 238-39.

der the explanation in *Martin v. L. & A. Contracting*, the two-year period would not begin running until the last disability payment, which probably was made in January of 1969.[95] Additional medical services were incurred in November 1970.

So at that point, the employer asserted that the one-year period was the earlier-expiring limitation and barred the claim. Upon losing that argument, the employer asserted that the later-expiring two-year period barred the claim. Thus, the employer took the position that it could have chosen, as the applicable limitation period, the one most favorable to the employer.

The ruling that the claim was not barred by the two-year statute is consistent with an outright reversal of the employer's position, in which event it would say that the claim would be barred only by the later-expiring period. But the court did not put it like that. Instead, the court, after quoting from *Martin v. L. & A. Contracting*, said, "[i]n our opinion, the payment of the $17.13 by the employer was compensation for the injury sustained, (sic) such payment tolled or erased the two-year statute of limitations . . . ."[96] The term "erased" appeared for the first time as part of the explanation of the effect on the two-year statute of the payment of disability benefits.

b. The Second Deviation

A later ruling that the two-year statute did not bar a claim in which disability benefits had been paid voluntarily came in *City of Kosciusko v. Graham*[97] Note that this was *not* a claim for further disability benefits, as the maximum amount had long since been paid when this claim for *medical services* was filed after 1976. The claim was for payment for home nursing services performed from 1964 to 1972. In ruling that the claim was not barred, the court rejected the insurance carrier's argument that the claim was barred by the one-year statute, the two-year statute, the general three-year and six-year statutes of limitations and the doctrine of laches.[98]

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[95] *Id.* at 237, The B-31 shows that the worker returned to the job on January 2, 1969. *Id.* at 240.

[96] *Id.* at 240.

[97] 419 So. 2d 1005 (Miss. 1982).

The court reached the correct result, though some of its explanations are suspect. The court's rejection of the general statutes of limitation and laches properly recognized that workers' compensation stands separate from the bodies of law governed by those provisions and contains its own limitations provisions to serve the distinct ends of workers' compensation law. However the court also said that "[t]he payment of these [ongoing medical] expenses constituted a payment of compensation for the purpose of tolling the one-year statute of limitations."[99] Actually, the one-year period would never have begun running, for it appears that no B-31 was ever filed.[100] The court states correctly that since the insurance carrier was liable for medical services needed daily, each expense incurred would interrupt the running if a one-year period had been set in motion.

In saying the claim was not barred by the two-year statute, the court wrote that " [t]his statute of limitations has no application to the case at bar because compensation benefits were paid unto claimant."[101] This is the other instance in which the court deviated from the discipline of the *Martin v. L. & A. Contracting* holding. Here, the court posed the "second question" of *L. & A. Contracting*—what was the effect on the statute when disability payments have been made. Instead of using *L. & A.*

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[98] *City of Kosciusko*, 419 So. 2d at 1006-08. A paraplegic from a 1964 work injury, the worker received the maximum disability payments of $12,500 at the rate of $35 weekly for 357 weeks, with the last payment due approximately September 1, 1971. *Id.* at 1006.

[99] *Id.* at 1008.

[100] *Id.* at 1006-08. If a B-31 were filed in a situation in which the employer-carrier knew of the continuing need for medical services, the commission should refuse to file it or on its own initiative or on the worker's motion strike it if it has been filed. There is no way the employer-carrier in those circumstances could make a good faith representation that its obligation is at an end. Also, it is firmly established that the duty to provide medical services extends past the disability benefit period and is in addition to the maximum disability benefits. *See, e.g.*, Lawrin Co. v. Frazier, 213 So. 2d 548 (Miss. 1968); J. H. Moon & Sons v. Hood, 144 So. 2d 782 (Miss. 1962).

[101] *City of Kosciusko*, 419 So. 2d at 1008 (citing Yazoo Mfg. Co. v. Schaffer, 179 So. 2d 784 (Miss. 1965)).

Contracting's "second" answer that the payment delayed the running of the two years, the court used the answer to the "first question" from *L. & A. Contracting.*

The court could have followed *Martin v. L. & A. Contracting* with these four steps:

1. The answer to the "second question" from *L. & A. Contracting* says the two-year period would begin to run when the last disability benefits were paid, probably about September 1, 1971. The period would have expired in 1973, assuming nothing else interrupted its running. The claim was filed more than two years later.
2. The statute is notably unclear on how the two time limitations work in tandem. Nothing says or suggests that the two-year statute displaces the one-year statute or *vice versa.*
3. This would bring the court face-to-face with the question posed above of whether an unclear statute should be interpreted to bar a claim by the earlier-expiring on the later-expiring period. Assume an answer of "later-expiring."
4. The one-year statute would be the later expiring since it had not begun running. It obviously does not bar the claim—the same result reached by the court.

The two explanations would differ in recognizing that both limitations periods exist side-by-side. But the most important difference is that instead of setting up a situation in which the earlier-expiring period bars the claim, the result would always be that only the later-expiring period would bar a claim.

c. *Side-by-Side Statutes*

On the surface, it may appear that the only difference between the four-step explanation and *Brown's* "erased" language is to excise "erased" and thus return to *L. & A. Contracting's* "tolled." But, actually *Brown* raises an issue which neither *Martin* nor *Yazoo Manufacturing Co.* highlighted. *It is the issue of the two statutes existing side-by-side.*

In an earlier case,[102] the court acknowledged the application of both statutes in a given situation. Anderson was injured in August 8, 1951, while working for National Advertising Co.; received medical treatment for a while before returning to work; left the job several months later when he was unable to perform the work. In July of 1954, he filed a claim against a subsequent employer. The court said that "[h]is claim against National Advertising Company was barred by both the one-year and two-year statutes of limitation."[103] Also, the next year the court's opinion cited both the one-year and the two-year statutes, and ruled the claim barred without saying which of the two expired periods governed.[104]

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[102] Anderson v. Ingalls Shipbuilding Corp., 91 So. 2d 756, 757 (Miss. 1957) (dismissing claim against Ingalls for aggravation of 1951 injury for lack of proof

In *L. & A. Contracting*, the facts would have been present for that issue to be raised except that there was nothing about a B-31. This could mean that once the court ruled that the claim was not barred by the two-year statue, there was no need to address the effect of any earlier-expiring period. More likely, however, it means the issue was not before the court for consideration at all. *L. & A. Contracting* is consistent with a "later-expiring" rule.

In *Yazoo Manufacturing Co.*,[105] the court actually did address the application of both the one-year and the two-year statutes as existing side-by-side. However, the expressions are so unclear that this is not readily apparent. By digging, we see that the court said if the injury is found not to be a new claim but a recurrence of the January 15, 1960, injury, then

> [T]he one-year statute did not begin to run until the employer had filed its report, Form B-31, for the additional [medical] benefits . . . occurring May 1960.[106] [Also], if it is not a new

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of new injury).

[103] *Id.* at 757.

[104] Trehern v. Grafe Auto Co., 100 So. 2d 786, 787-88 (Miss. 1958). The court relied on a Florida precedent which applied a statute whose counterpart was the Mississippi two-year statute, not the "reopening" statute. *See* discussions *infra* pp. 63-65. *Id.* at 788.

[105] 179 So. 2d 784 (Miss. 1965).

[106] *Yazoo Mfg. Co.*, 179 So. 2d at 791 (quoting MISS. CODE ANN. § 6998-18(a) (1942), current version at § 71-3-35 (1972)). The only additional benefits were the medical services provided by Dr. Gillespie in early May of 1960. *Id.* at 786. The only B-31 was filed February 18, 1960; its effect was superseded by the later pay-

> claim, the two-year statute does not . . . [bar the claim] because the "application for benefits [would have been] filed within two years from the date of the injury.[107]

This was a situation in which neither the earlier nor the later-expiring period would bar the claim for a January 15 injury. So while the court may have made hints both ways—that the earlier-expiring period governed and that the later-expiring period governed—it ruled on neither.

A later case appears to recognize the two statutes as standing side-by-side and apply the later expiring of the two. However, the opinion in *Benoit Elevator Co. v. Mitchell*[108] is cryptic to a fault and contains no explanation to this (or any other) effect. Disability benefits and medical services were paid voluntarily in 1959 for an injury of June 16, 1959, and a signed B-31 was filed in September of 1959. On June 16, 1975, the worker filed a claim for more disability benefits and medical services. The ill-functioning and painful finger from the 1959 injury and subsequent treatment had prompted the worker to get medical treatment earlier in 1975. There seemed to be no question that the worker's impaired finger resulted from the work injury. The employer asserted a time-bar and also disputed any disability resulting from the injury beyond that paid in 1959 for 15 percent loss of use of the middle finger.[109]

The administrative judge awarded disability and medical benefits; the commission ruled the claim time-barred; the circuit court reversed the commission and essentially reinstated the administrative judge's award, viewing the recent manifestation of injury as the result of a latent condition. Although the supreme court ruled the claim barred by the statute without expressly citing either of the two statutes, the court framed its opinion in terms of the two-year statute.[110] The court said it

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ments, so no one-year period was running. *Id.* at 787.

[107] *Yazoo Mfg. Co.*, 179 So. 2d at 791.

[108] 485 So. 2d 1068 (Miss. 1986). (West Publishing Co. alone names "Benoit Elevator Co." as "Benoist Elevator Co." The parties and court used "Benoit").

[109] *Benoit*, 485 So. 2d at 1068-70.

[110] *Id.* at 1069-70.

was ruling on the employer's assertion that "[c]ommission Form B-31 was properly filed September 14, 1959, hence the claim was barred two years thereafter."[111]

The opinion cites neither the one-year or the two-year statute. The only time limitation cases discussed are three cases on when the two-year period begins running in the event of a latent condition. Actually the appellant's Assignment of Errors says the circuit court erred in applying the two-year statute instead of the one-year statue. Much of the appellant's brief discusses the cases on the two-year statute, citing none of the one-year cases but making the point that the latent injury doctrine would not save this worker's claim. The court agreed that "[t]he facts of the instant case are closely kin to those found in *Quaker Oats Co. v. Miller*, 370 So. 2d 1363 (Miss. 1979)."[112]

If the rule were that only the later-expiring period would bar a claim, this claim would be barred unless a latent condition doctrine would save it. That apparently was the view of the administrative judge and was the outspoken view of the circuit judge who wrote that it "would indeed be unjust"[113] to bar a claim so clearly arising from a work injury.

6. *How the Twain Should Meet*

a. *Suspend v. Erase*

The explanation in *Martin v. L. & A. Contracting* that the payment suspends the running of the two-year period allows the two limitation periods to exist side-by-side. It also allows a rule that a claim is barred by the later-expiring period. The "erased" explanation in *Brown v. Woolworth* means that the one-year statute displaces the two-year statute and allows an employer to chose the earlier-expiring of the two periods.

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[111] *Id.* at 1069.

[112] *Id.* In *Quaker Oats*, the two-year statute barred the claim because the worker had known for more than two years before the claim of his disability and its work connection. *Quaker Oats*, 370 So. 2d at 1364.

[113] Circuit Court Order, Record at 133, Benoit Elevator Co. v. Mitchell, 485 So. 2d 1068 (Miss. 1986) (No. 55,344).

The "erased" explanation, of course, contradicts *L. & A. Contracting*. Perhaps it was thought to be necessary as the *only way* of explaining why that claim, filed April 28, 1972, for an injury of December 24, 1968, was not barred by the two-year statute. Another way of explaining the result on these facts is to say that both the one-year and the two-year periods are relevant. And in order for the passage of time itself to bar consideration of the claim on its merits, the later expiring of the two periods must have lapsed. In *Brown*, the later expiring would *not* bar the claim because the April 1969 B-31 was not effective to give the notice needed to start the one-year period.

If *Brown* had followed the "suspend" approach from *L. & A. Contracting*, the steps would have been as follows:

a. The answer to the "second question" from *L. & A. Contracting* says the two-year period would begin to run when the last disability benefits were paid, probably in January of 1969 but in any event before the April 24, 1969, date shown on the "receipt." The period would have expired in the early part of 1971, assuming nothing else interrupted its running. The claim was filed in 1972.

b. The statute is notably unclear on how the two time limitations work in tandem. Nothing says or suggests that the two-year statute displaces the one-year statute or *vice versa*.

c. This would bring the court fact-to-face with the question posed above of whether an unclear statute should be interpreted to bar a claim by the earlier-expiring or the later-expiring period. Assume an answer of "later-expiring."

d. The one-year statute would be the later expiring since it had not begun running. Since it was not set in motion, it does not bar the claim—the same result reached by the court.

b. Barred Only by the Later-Expiring Period

This approach is not unusual in workers' compensation. Note, for example, the current Arkansas provision in answer to the "first question" from *L. & A. Contracting*:

> TIME FOR FILING. (1) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with

> the commission within two (2) years from the date of the injury. If, during the two-year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.[114]

Then, in answer to the "second question" from *L. & A. Contracting*, the provision is:

> TIME FOR FILING FOR ADDITIONAL COMPENSATION. In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater. The time limitations of this subsection shall not apply to claims for replacement of medicine, crutches, artificial limbs, and other apparatus permanently or indefinitely required as the result of a compensable injury, where the employer or carrier previously furnished such medical supplies.[115]

Said another way, only the later-expiring period can bar a claim. The Florida approach is the same in that "[t]he statute of limitations for a workers' compensation claim is two years after either (a) the date of accident or (b) the last payment of compensation benefits or (c) the last remedial medical treatment furnished by the employer."[116] Although the quotation efficiently telescopes the two questions into one, the governing statute[117] is much more detailed, laying out the separate an-

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[114] ARK. CODE ANN. § 11-9-702(a) (Michie 1987).

[115] *Id.* § 11-9-702(b).

[116] Ken Lones Landscaping Inc. V. Tucker, 382 So. 2d 1368, 1370 (Fla. Dist. Ct. App. 1980) (*See supra* note 4).

[117] FLA. STAT. ANN. § 440.19 (West 1991). The statute includes these provisions:

> (1)(a) The right to compensation for disability, rehabilitation, impairment, or wage loss under this chapter shall be barred unless a claim therefore which meets the requirements of paragraph (e) is filed within 2 years after the time of injury, except that, if payment of compensation has been made or remedial treatment or rehabilitative services have been furnished by the employer on account off such injury, a claim may be

swers to the two separate questions and more. The bottom line is that only the later-expiring period can bar a claim.

c. *Reasons for the Choice*

On what basis would one choose the later-expiring period as being more in harmony with workers' compensation law than the earlier expiring? Of the three principal bases for limitations generally,[118] not one calls for barring a claim by the earlier-expiring period. Liberal interpretation to promote the purposes of workers' compensation militates in favor of the

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> filed within 2 years after the date of the last payment of compensation or after the date of the last remedial treatment or rehabilitative services furnished by the employer . . . . .
>
> (b) All rights for remedial attention under this section shall be barred unless a claim therefor which meets the requirements of paragraph (e) is filed with the division within 2 years after the time of injury, except that, if payment of compensation has been made or remedial attention or rehabilitative services have been furnished by the employer without an award on account of such injury, a claim may be filed within 2 years after the date of the last payment of compensation or within 2 years after the date of the last remedial attention or rehabilitative services furnished by the employer; and all rights for remedial attention or rehabilitative services under this section pursuant to the terms of an award shall be barred unless a further claim therefor is filed with the division within 2 years after the entry of such award, except that, if payment of compensation has been made or remedial attention or rehabilitative services have been furnished by the employer under the terms of the award, a further claim may be filed within 2 years after the date of the last payment of compensation or within 2 years after the date of the last remedial attention or rehabilitative services furnished by the employer. However, no statute of limitations shall apply to the right for remedial attention relating to the insertion or attachment of a prosthetic device to any part of the body . . . . .
>
> (c) For purposes of this section, "remedial treatment or attention" means the provision of skilled services provided by a physician or any recognized health care provider as defined in section 440.13.
>
> (d) The right to compensation for death under this chapter shall be barred unless a claim therefor which meets the requirements of paragraph (e) is filed within 2 years after the death, except that, if payment of compensation has been made without an award on account of such death, a claim may be filed within 2 years after the date of the last payment . . . .

Id.

[118] *See supra* note 11 and accompanying text.

later-expiring period. More to the point, however, is the fundamental explanation in *L. & A. Contracting*, which is based on the practical effect on the worker when the employer assumes responsibility by paying benefits.

> [A]ppellees would be estopped from denying that the statute was tolled while they were voluntarily paying claimant compensation benefits . . . .
>
> . . . [P]ayments of wages toll the limitation statute, if they were made on account of a recognition of compensation liability.
>
> . . . The most important factor here is that appellee voluntarily paid compensation to claimant, and this constituted waiver of formal claim, estopping appellees from asserting the contrary.[119]

The employer sends a definite signal to the worker by providing workers' compensation benefits. The worker is expected to and entitled to rely on that status until there is a clear contradiction of it. From the time of the contrary message (cessation of benefits in *L. & A. Contracting*), the worker at least has the statutory period available within which to file a claim. The employer should not be allowed to lull the worker into inaction by the comfort that benefits are being provided, and then spring on the worker the surprise of a now-expired limitation period. The *L. & A. Contracting* approach guards against this if disability benefits have been paid. Nor should the employer be allowed to shorten the limitation period by cleverly choosing a particular course of action which has that effect. The "erased" language of *Brown v. F.W. Woolworth* allows the employer to shorten the two-year period by paying disability benefits and filing a B-31 to engage the one-year statute. If the "later-expiring" doctrine is given general application, this is a form of built-in protection against lulling the worker into inaction, as discussed below.

In *L. & A. Contracting*, no notice in the form of a B-31 or otherwise warned the worker against reliance on the employer's responsibility. When disability benefits have been paid and a B-31 has been filed properly, the worker has notice not to rely further on the employer's assumption of responsibility. *In this circumstance the two-year period, now relieved of the reason for its being suspended, would begin running. Its running would relate back in time to the normal running of the two-year period.* The later-expiring of one year from the effective date of the B-31 or the two-year period would bar the claim. The later-expiring rule would preclude shortening the period with a B-31. Its relating back to the normal beginning of the two-year period fits the usual pattern of the limitations program, gives meaning to the notice of the B-31 and does not penalize an employer for voluntary payments.

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[119] *L. & A. Contracting*, 162 So. 2d at 873.

The "later-expiring" option would not open any floodgates nor promote stale claims. No floodgates were opened by the *results* of *L. & A. Contracting*, *Yazoo Manufacturing Co.*, *Brown* and *City of Kosciusko*. With one exception, those results are consistent with the "later-expiring" doctrine. In *L. & A. Contracting*, *Brown* and *City of Kosciusko*, the claims were held not barred, and this doctrine would produce the same result. Under both approaches, proper filing by Woolworth of a B-31 after the November 1970 medical service would have barred the claim of April 28, 1972, unless there were other facts to save the claim. In *Yazoo Manufacturing Co.*, the two approaches produce the same result if the injury was on January 15, 1960 (not barred). However, if the injury was on May 1, 1960, the court's result that the October 31, 1962, claim was barred would be duplicated by the "later-expiring" approach only if a B-31 had been filed properly before October 31, 1961, as to the May 1960 medical services. This latter result actually falls into a different category, for no disability benefits were paid for a May 1960 injury. The factual circumstance when no disability benefits were provided but medical services were provided is the topic of the next section and is where the "lulling" is most likely to occur.

An additional two-part reason exists for preferring the "later-expiring" option. Further assurance against its opening a floodgate if the one-year period expires later lies in the fact that "reopening" under that section 71-3-53 is discretionary with the commission and is available only for the reasons stated: "a change of conditions" or "mistake in a determination of fact."[120] While this should be construed broadly, the limits do impose a measure of control. Secondly, if the two-year period expires later, it may be needed for a fair result if the one-year grounds do not exist or do not find favor with the commission's discretion. Of course, the ultimate control is on the merits, where the worker has the burden of making a persuasive case with substantial evidence.

7. *When Medical Benefits Only Have Been Provided*

a. *The Answered and the Unanswered Questions*

In four cases,[121] the employer successfully asserted the bar of the two-year statute when the employer had provided medical services but no disability benefits. One explanation of these cases is to say that the two-year statute applied because the employer paid no disability benefits and the claims, which were filed more than two years after the injury, were barred because incurring medical expenses did not stop the running of the two-year statute. The *results* of all four cases bear out this proposition, and *Speed Mechanical* explicitly says that "where medical only is paid, the legislature has provided that two years from the date of the injury is a sufficient period of time in which to either file a claim for compensation, or be barred therefrom."[122] What the court failed to address is the disharmony between this result and the statutory requirement in section 71-3-37(7) that the employer must file Commission Form B-31,[123] within thirty days of the final payment of compensation as notice to the worker that the employer's obligation is at an end. That statute also says that "no case shall be closed" without such notice.[124] Notwithstanding this requirement, in none of these cases[125] has the court discussed the issue of whether the employer must file a B-31 after providing medical benefits only. In *Speed Mechanical*, the court acknowledged its earlier rulings by stating, "the one year statute [§ 71-3-53] commences running *from the date of the last payment of compensation*, whether weekly indemnity benefits or medical benefits [are paid]."[126] In addition, the court concluded "that the legislature considered medical treatment as a payment of compensation."[127]

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[120] MISS. CODE ANN. § 71-3-53 (1972).

[121] Speed Mechanical, Inc. v. Taylor, 342 So. 2d 317 (Miss. 1977); Yazoo Mgf. Co. v. Schaffer, 179 So. 2d 784 (Miss. 1965) (if on remand injury was found to be new injury of May 1, 1960); Modern Laundry v. Harrell, 150 So. 2d 409 (Miss. 1963), *overruled by* Tabor Motor Co. v. Garrard, 233 So. 2d 811, 817 (Miss. 1970) (to extent that holding was inconsistent with "discovery rule" for latent injuries); Thyer Mfg. Co. v. Keys, 108 So. 2d 876 (Miss. 1959), *overruled by* Tabor Motor Co. v. Garrard, 233 So. 2d 811, 817 (Miss. 1970) (to extent that holding was inconsistent with "discovery overruled rule" for latent injuries).

[122] *Speed Mechanical*, 342 So. 2d at 320.

The missing link in these cases, including *Speed Mechanical*, is the lack of discussion or ruling on the related issue of whether the employer must file a Form B-31 after providing medical benefits only. Section 71-3-37(7) is very clear in stating that "after the final payment of compensation," the employer must file a B-31[128] as notice to the worker that the employer regards its obligation as being at an end.[129] After the court acknowledged in *Speed Mechanical* that it would consider medical treatment as payment of compensation for purposes of the periods of limitation on claims, the screen went blank.

So while we know the results of these four cases and the language of *Speed Mechanical*, we also know that the court has not dealt with this specific issue of the need for a B-31. The statute seems to call for it. If notice by B-31 is a recognized requirement, then the one-year statute would come into play even though medical expenses may not stop the running of the two-year statute. Presumably, a claim would be barred only if both periods of limitation have expired. This returns to the matter of the two statutes existing side-by-side. It should be noted that if they operate side-by-side, in three of these four cases, the one-year statute would have barred the claims had the employer properly filed Form B-31.[130] But in *Speed Mechanical*, the claim for further medical services would not have been barred because it could have been filed only seven months after the last payment of compensation for medical services.[131]

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[123] Mississippi Workers' Compensation Commission Procedural Rule 17 specifies that the notice called for in § 71-3-37(7) shall be given by use of its Form B-31.

[124] MISS. CODE ANN. § 71-3-37(7) (1972 & Supp. 1992).

[125] *See supra* note 121.

[126] *Speed Mechanical*, 342 So. 2d at 320.

[127] *Id.*

[128] Mississippi Workers' Compensation Commission Procedural Rule 17 specifies that the notice requirement in § 71-3-37(7) shall be met by filing its Form B-31.

[129] MISS. CODE ANN. § 71-3-37(7) (1972 & Supp. 1992). Also, the statute contains a clear mandate that "no case shall be closed" without such notice. *Id.*

b. *The Three Which Could Be Barred*

First, it is necessary to examine the three cases in which a properly filed B-31 would have barred the workers' claims if that form is recognized as a necessity in "medical only" cases. In the first two cases, as in *Speed Mechanical*, the workers did not miss enough work to entitle them to disability benefits during the two-year limitation period. However, they incurred medical expenses during that time.

In *Thyer Manufacturing Co. v. Keys*,[132] the court made its first decision applying the two-year statute. The injury occurred on January 28, 1955, and although the worker missed a few days of work,[133] he did not miss enough days to be entitled to disability benefits.[134] He filed a claim for the later-developing disability and for further medical services on June 13, 1957.[135] The attorney-referee found that the disability resulted from the work injury and awarded benefits, but the commission reversed and ruled the claim barred by the two-year statute. The circuit court agreed with the attorney-referee and reinstated the award.[136] The Mississippi Supreme Court reversed the circuit court's ruling and reinstated the commission's ruling which barred the claim.[137] The court did not discuss the applicability of the one-year statute or the need for the employer to file a B-31 after payment of medical expenses.[138] Much of the opinion deals with when the two-year period began, as the worker claimed he did not know the injury would be disabling until after 1955.[139]

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[130] *See infra* notes 132, 140, 144 and accompanying text. In each of these cases, the employer either failed to file a B-31 or the worker filed a claim for additional benefits more than one year after the final payment of compensation.

[131] *Speed Mechanical*, 342 So. 2d at 318-19.

[132] 108 So. 2d 876 (1959), *overruled by* Tabor Motor Co. v. Garrard, 233 So. 2d 811, 817 (Miss. 1970) (to extent that holding was inconsistent with "discovery rule" for latent injuries).

[133] *Thyer Mfg.*, 108 So. 2d at 877.

[134] MISS. CODE ANN. § 6998-06 (1942). This section provided no disability benefits, only for medical benefits, during the first five days of the disability. The present code also contains the five-day waiting period. MISS. CODE ANN. § 71-3-11 (1972 & Supp. 1992).

[135] *Thyer Mfg.*, 108 So. 2d at 877.

Similarly, in *Modern Laundry v. Harrell*,[140] the court ruled that the two-year statute barred the worker's claim.[141] The injury occurred on January 15, 1955, and medical services were provided as late as March 1, 1955. The employee filed a claim for the later-developing disability in June of 1957.[142] The circuit court reversed the denial of benefits and awarded temporary disability benefits. Relying upon *Thyer Manufacturing*, the supreme court ruled the claim barred. There was no mention of the one-year statute or the need for a B-31 after the employer's payment of medical expenses. Most of the opinion deals with the rejection of the worker's allegation of an additional injury on June 15, 1956. Had there been such a later injury the claim would not have been barred.[143]

In *Yazoo Manufacturing Co. v. Schaffer*,[144] the court remanded the case for a finding of whether the injury was a recurrence of the January 15, 1960 injury or a new injury occurring on or about May 1, 1960.[145] The court stated that if it was found to be a new injury, the only claim for that injury was the "amendment" of October 31, 1962.[146] Although disability benefits had been paid earlier and a claim filed on March 20, 1961, for the January 15, 1960, injury, the employer had not paid disability benefits for a May 1, 1960, injury.[147] Medical services were provided as late as May of 1960 in response to the May 1 ailment.[148] Immediately after the May 1 episode, the employee missed four days of work and was subsequently terminated when, on his return, his back condition grew worse.[149] The court held that the two-year statute would bar the October 31, 1962, claim for a new injury on May 1, 1960.[150] The court did not discuss the effect of providing medical services in May of 1960 on the two-year statute, nor the need for the employer to file a B-31 after providing those medical services.[151] In none of the three cases was this issue raised in the opinion or decided by the court.

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[136] *Id.* at 878.

[137] *Id.* at 880.

[138] MISS. CODE ANN.6998-19(g) (1942), the exact predecessor of MISS. CODE ANN. § 71-3-37(7) (1972 & Supp. 1992), required filing of the notice after "final payment of compensation." As later explained in the text, proper filing of the B-31 is required by this provision to set the one year period in motion.

[139] *Thyer Mfg.*, 108 So. 2d at 879-80.

[140] 150 So. 2d 409 (Miss. 1963), *overruled by* Tabor Motor Co. v. Garrard, 233 So. 2d 811, 817 (Miss. 1970) (to extent that holding was inconsistent with "discovery rule" for latent injuries).

[141] *Modern Laundry*, 150 So. 2d at 410.

[142] *Id.* at 409.

[143] *Id.* at 410.

[144] 179 So. 2d 784 (Miss. 1965).

c. *The Lulled Worker and the Barred Claim: Speed Mechanical, Inc. v. Taylor*

The greatest tension produced by this case law is in *Speed Mechanical, Inc. v. Taylor*.[152] The injury occurred in May of 1971.[153] No disability benefits were due[154] because the worker either missed no work or fewer days than required by the five-day waiting period.[155] The employee had suffered serious mouth injuries and his employer paid the bills up through April 25, 1973, almost two years after the injury.[156] When the employee needed additional medical services after the end of the two-year period, the employer refused to provide them. He then filed a claim in November of 1973, more than two years after the injury but less than seven months after the last medical services for which payment was made.[157] The employer contended that inasmuch as it did not provide payment for benefits "other than medical" treatment within two years from the date of injury, the claim was barred as to all benefits.[158] The court held that the claim was barred by the two-year statute.[159]

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[145] *Yazoo Mfg.*, 179 So. 2d at 791.

[146] *Id.* at 790. The claimant originally filed on March 20, 196. *Id.* at 785. He then obtained an order permitting him to amend his claim, which he did on October 31, 1962. *Id.* at 786.

[147] *Id.* at 875-86.

[148] *Id.* at 791.

[149] *Id.* at 786.

[150] *Yazoo Mfg.*, 179 So. 2d at 791.

[151] The court did discuss the effect of providing medical services in May of 1960 on the B-31 filed on February 8, 1960. *Id.* at 788. The court stated it would stop the running of the one-year period which had been set in motion by the B-31. *Id.* at 788, 791.

[152] 342 So. 2d 317 (Miss. 1977).

[153] *Speed Mechanical*, 342 So. 2d at 318.

[154] *Id.*

The holding is similar to those in *Thyer Manufacturing* and *Modern Laundry*. The cases are similar in this regard: because no disability benefits were payable (due to little or no lost work time during the two years after injury) and because all medical expenses had been paid during the two years following the injury, no claim existed prior to the expiration of the two-year period. The cases differ, however, in two important respects. While the barred claim in *Speed Mechanical* was only for medical expenses,[160] the other cases involved additional claims for disability benefits. The other important difference is that in *Speed Mechanical*, medical benefits were voluntarily provided up to approximately one month before the end of the two-year period,[161] while in the other three cases, the employer provided medical benefits for only the first few days or weeks of the two-year period.

This difference is significant because in *Speed Mechanical*, the employer's payment of all medical expenses during the twenty-three and one-third months following the injury assured the worker, in effect, that the employer recognized its obligation to provide benefits. Since the statute states that medical benefits are due "for such period as the nature of the injury or the process of recovery may require,"[162] the worker had every reason to be lulled into a feeling of security that the employer would furnish payment for any medical services needed later. *There was no claim to file between the last payment for medical services and end of the two-year period.* In the other three cases,[163] the payment of medical services for only the first days or weeks after injury did not have the same lulling effect as in *Speed Mechanical*. The payment of medical benefits in these four cases did not stop the running of the two-year statute. In contrast, the one-year statute is interrupted by later medical services, taking away the opportunity for voluntary payments to lull a worker into a false sense of security.[164]

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[155] *See supra* note 134.

[156] *Speed Mechanical*, 342 So. 2d at 319. The employers' carrier paid a lump sum dental bill of $1,225 in August of 1971. *Id.* at 318. Thereafter, the worker received further adjustments for dental work. *Id.* at 319. It was undisputed that he received no payments for disability within the two-year period. *Id.*

[157] *Id.*

[158] *Id.*; MISS. CODE ANN. § 71-3-35(1) (1972 & Supp. 1992).

[159] *Speed Mechanical*, 342 So. 2d at 320.

[160] *Id.* at 318.

[161] *Id.*

In the early two-year case of *Martin v. L. & A. Contracting Co.*,[165] the court spoke to this phenomenon:

> Claimant's conduct in refraining from filing a claim as long as he was receiving compensation, was reasonable . . . . Voluntary payment of compensation under these circumstances constituted a waiver of formal claim and rendered claimant's delay reasonable.
>
> . . . The most important factor here is that appellees voluntarily paid compensation to claimant, and this constituted a waiver of formal claim, estopping appellees from asserting the contrary.[166]

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[162] MISS. CODE ANN. § 71-3-15(1) (1972 & Supp. 1992).

[163] *See supra* note 121 and accompanying text.

[164] *See supra* note 151.

[165] 162 So. 2d 870 (Miss. 1964).

[166] *L. & A. Contracting*, 162 So. 2d at 873. In addition to this reference, the notion of estoppel to assert the bar of the two-year statute has come up in other cases. *See* Casey v. Deeson Cash Grocery, 247 o. 2d 534, 535 (Miss. 1971) (holding employer's misrepresentation did not estop him from asserting statute of limitations, since employee knew representation was false); Childs v. Mississippi Indus. for the Blind, 184 So. 2d 872, 874 (Miss. 1966) (holding employer's misrepresentation did not estop it from asserting bar of statute of limitations since

There the court was talking about the lulling effect of disability and medical benefits. As previously noted, "compensation" has been construed to include medical services for purposes of the periods of limitations.[167] For a worker who has an impairment which creates a need for medical services but does not cause disability, such as in *Speed Mechanical*,[168] providing the needed medical services is the employer's signal of accepting responsibility. The implicit assurance is equally potent to render claimant's nonfiling reasonable, even essential.

If a worker consults a lawyer just before the two-year period expires, what can the lawyer do to preserve the right to medical services which may be needed in the near future? If providing medical services a few days prior to the expiration of the two-year limitation does not stop the running of the time period, what would? On the face of it, there is no claim to be filed, as there is no unmet need at this time.

Filing a claim solely for the purpose of tolling the statute of limitations under these circumstances is questionable.[169] A

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worker was familiar with procedures surrounding claims for compensation); *overruled by* Tabor Motor Co. v. Garrard, 233 So. 2d 811, 817 (Miss. 1970) (to extent that holding was inconsistent with "discovery rule" for latent injuries); Shepard v. Walley Timber Co., MWCC No. 87 05838-D-2229, August 29, 1989 (finding employer's fraud in concealing insurance coverage estopped employer from pleading statute of limitations).

[167] *See supra* note 151.

[168] *See supra* notes 152-55 and accompanying text.

[169] *See* MISS. CODE ANN. § 71-3-59 (1972 & Supp. 1992). This section contains one caveat:

> (1) If the court having jurisdiction of proceedings in respect of any claim or compensation order determined that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.
>
> (2) If the full commission determines that proceedings in respect to a claim have been instituted, continued or delayed without reasonable ground, the full commission shall require the party who has so instituted, continued or delayed such proceedings or the attorney advising such party, or both, to pay the reasonable expenses, including attorney's fees, caused by such institution, continuance or delay to the opposing party.

Id.

worker could return for needed medical services within the two-year period, obtain a copy of the bill for the services, and file it with a claim in the form of a motion seeking a commission order to require the employer to pay for the needed service. The worker would thereby have filed a claim within two years of the injury. Discounting the gamesmanship feature of this tactic, it is unlikely to occur because the worker would normally have no reason to seek advice at this stage. The "lulling effect" took hold.

A majority of the commissioners decided *Speed Mechanical* in favor of the worker on the ground that the two-year statute was not a bar to medical benefits, but only to disability benefits. The circuit court agreed, but the Supreme Court of Mississippi disagreed.[170] Because the commission decided the two-year statute did not bar a claim for medical services, the commission never addressed the following question:

> When medical benefits have been provided but no disability claim exists or has been paid, must the employer file a B-31 to set in motion the one-year period, which is the worker's notice that rights can be lost at the end of the period?

Since the commission's ruling was not based on the issue of the B-31 and the one-year statute, the court did not have that issue squarely before it. Obviously, the court commented on the one-year statute and rejected its pertinence in a statement[171] which itself would seem impertinent from any other source.

In fact the court's explanation in *Speed Mechanical* is fertile ground for criticism. First, the court never acknowledged that the "lulling effect" on the worker must be dealt with, even though 13 years earlier in *L. & A. Contracting*, the court found that an employer could be estopped from asserting a bar.[172] Second, although the court stated that when the two-year statute barred a "compensation" claim, the bar as to "compensation" included "medical,"[173] the court never addressed the requirement in section 71-3-37(7) that a notice to the worker must be filed after the final payment of "compensation" -- a term which also includes "medical." The logical inconsistency that "compensation" includes "medical" as a bar but does not include "medical" for the purpose of the required notice of another time bar has a profound practical and symbolic effect. Third, the court's statement that the commission's review power under section 71-3-53 could not be used after a voluntary medical payment because "there cannot be a 're-view' where there has been no first 'view'"[174] is outright aberrational. Not only does this contradict the holdings of numerous cases,[175] but also the language of the very statute, which says the review power exists "whether or not a compensation order has been issued."[176]

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[170] *Speed Mechanical*, 342 So. 2d at 318.

[171] *Id.* at 320.

[172] *See supra* notes 166, 167 and accompanying text.

Only three years earlier in *Struthers Wells-Gulfport, Inc. v. Bradford*,[177] the court recognized the unfairness of the two-year statute operating to bar a claim when there was no claim to file within the two-year period. "Medical only" had been provided during the first 18 months after the work ailment. After the end of the two-year period, the carrier refused to provide further medical services. No claim for disability benefits arose during the two years, and the worker filed this "late" claim for further medical services.[178] The court said the claim was not barred, because the two-year period began running only at the later time when the worker knew that there was a continuing need for treatment related to the work incident. To classify the reoccurring need for medical treatment, the court said the "injury resulting from the accident was latent."[179] Since she had been treated sporadically during the eighteen months after the episode, what was latent was the continuing need for treatment and the precise diagnosis. The case parallels *Speed Mechanical* in several important respects: 1) Both workers' need for treatment was due to the work ailment, 2) the payment for medical services meant there was no claim for an unmet need during the two years, 3) this lulled the worker into inaction making the delay in filing not only reasonable, but necessary and 4) a claim was filed promptly after services were refused by the carrier.[180] Somehow the *Speed Mechanical* court seemed to lose its bearings, ignoring the statute, the precedents and the virtual trickery allowed by the ruling.

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[173] *See supra* note 151.

[174] *Speed Mechanical*, 342 So. 2d at 319-20.

[175] *See, e.g.*, Nichols v. American Creosoting Co., 147 So. 2d 76, 77-78 (Miss. 1962) (stating commission should have heard claim of worker who accepted voluntary payment despite filing of B-31, since claimant had not received notice); Graeber Bros., Inc. v. Taylor, 115 So. 2d 735, 736-37 (Miss. 1959) (commission was correct in awarding benefits upon reopening after prior voluntary payment of benefits), *sugg. of error overruled*, 117 So. 2d 469 (Miss. 1960); Hale v. General Box Mfg. Co., 87 So. 2d 679 (Miss. 1956) (commission erred in declining to reopen during one year from B-31 after prior voluntary payments). *See infra* notes 257-68 and accompanying text.

[176] MISS. CODE ANN. § 71-3-53 (1972 & Supp. 1992).

[177] 304 So. 2d 645 (Miss. 1974).

[178] *Struthers Wells*, 304 So. 2d at 647.

d. A Better Answer

The explanations for barring claims when only medical benefits have been paid produce a set of rules which seem to defy other related interpretations of the statute and to set the worker up for unfair treatment. A better approach is to acknowledge that if "compensation" includes "medical" for purposes of the two-year limitation, then "compensation" also includes "medical" for purposes of the notice required after the last payment of "compensation." That is, the employer must file the notice required by section 71-3-37(7) before closing a case[181] for medical benefits only, just as in situations when disability benefits have been provided.[182] In other words, the two statutes should be regarded as existing side-by-side, with the claim being barred only by the later-expiring of the two.[183] To say that medical services erase the applicability of the two-year statute seems as unjustified (and unnecessary) as saying that disability payments have that effect.

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[179] *Id.* at 649.

[180] *Id.* at 647. The court considered a similar situation in Tabor Motor Co. v. Garrard, 233 So. 2d 811 (Miss. 1970). The employer provided extensive medical services for eighteen months immediately following the injury and the worker did not miss enough work to have a disability claim until after the two-year period expired. *Tabor Motor*, 233 So. 2d at 813. In holding that the claim was not barred, the court recognized the unfairness of barring a claim before there was an unmet need for benefits. *Id.* at 814-15. The court said that the two-year period began running only when the need existed. *Id.* at 814.

[181] *See supra* notes 123, 124 and accompanying text.

[182] *See, e.g.*, Brown v. F.W. Woolworth Co., 348 So. 2d 236, 240 (Miss. 1977)

To test whether the statute calls for notice before barring a matter in which "medical only" has been provided, one must ask whether that situation rises to the level of a "case" as referred to in section 71-3-37(7). If medical benefits were provided pursuant to an order, it would certainly seem to be a "case" - one which requires a B-31 and which could be reopened within a year under section 71-3-53. Thus, it seems clear that medical services, whether provided voluntarily or pursuant to an order, rise to the statutory level of being a "case." As such, the statute calls for notice before the matter can be closed, and thus a B-31 is required.

This approach would give the entire limitations topic a much needed measure of coherence and clarity, not to mention fairness to all concerned. It would parallel the method suggested above, where disability benefits have been paid, so that the same regimen would apply for whichever form of benefits have been provided. This doctrine would not preclude the use of estoppel when the facts call for it, nor would it displace the "discovery" rule for determining when the two-year period begins to run. Furthermore, this approach would not open any floodgates. In three of the four cases above,[184] a proper B-31 would have barred the claims. In the fourth, the worker would have the benefit of the notice requirement of section 71-3-37(7).[185]

(holding since proper B-31 was required when employer had paid salary of $17.13 in lieu of disability benefits, defective B-31 did not start one-year period, so claim was not barred).

[183] MISS. CODE ANN. § 71-3-53 (1972 & Supp. 1992). This section authorizes the commission to act in a "case" whether or not a compensation order has been issued. *Id.*

[184] *See supra* note 130 and accompanying text.

[185] *See supra* note 131 and accompanying text.

E. What Starts the Running of the Two Years? When Worker Should Know of Work-Connected Disabling Injury

The sections above discuss topics of whether the two-year limitation period, having been set in motion, can become inapplicable to a claim by being "erased"; whether its running can be delayed or interrupted; and whether it displaces or can exist side-by-side with the one-year limitation. Questions also arise about what starts the running of the two-year period. This is sometimes referred to as whether the clock begins when the accident occurs or later when the worker "discovers" the effects of the accident.

In four cases decided during the 1970s, the court was faced with situations in which the claim was filed more than two years after the work incident which produced the disability or medical expenses. The question was whether the two years began running at the date of the incident (accident) or at the later time when the worker first knew of the existence of a work disability (injury). In these opinions, the court clearly resolved that the two years began running only at the later date. Thus, a claim filed more than two years after the incident but within two years of the discovery of the injury was timely filed and not barred. The court overruled some earlier decisions, and later cases have snuggled their factual variations into this doctrine.

1. The New Doctrine of Tabor Motors: Not Until Disability Occurs

In *Tabor Motor Co. v. Garrard,*[186] a hot welding spark fell into the worker's ear on October 7, 1964 and required immediate medical treatment and three days lost time.[187] The symptoms, including headaches and dizziness, persisted and the worker obtained intermittent treatment. On March 14, 1966, a doctor removed a piece of slag from the worker's ear, where it had been since the October 7, 1964 incident. He returned to work May 11, 1966, but by November 15, 1966, he was unable to work due to dizziness and other symptoms related to the ear injury. The worker then filed a claim for disability benefits on April 4, 1967, more than two years after the accident. No disability benefits had previously been paid but the employer had paid for medical services. Physicians had not diagnosed the worker's dizziness and headaches as being associated with the ear injury until after the surgery of March 14, 1966.[188]

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[186] 233 So. 2d 811 (Miss. 1970).

[187] *Tabor Motor*, 233 So. 2d at 812.

In ruling that the claim was not time-barred the court noted that benefits are payable for disability and that "disability" means incapacity to earn wages.[189] The incapacity to earn wages for which the claim was filed did not occur until November 15, 1966.[190] The two-year period cannot begin to run until there is an injury and, as the court stated, "the word 'injury' in the two-year limitation statute, refers to a compensable injury in which incapacity and its extent can reasonably be ascertained by medical findings."[191] Other parts of the court's ruling were stated in these different ways:

> We do not think that the time for a claim to be filed with the Commission began to run until Garrard, as a reasonable man, should have recognized the nature, seriousness, and probably consequences of his injury . . . . In short, the two-year limitations did not begin to run until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained.[192]
>
> . . . .
>
> We hold that where latent injuries are involved, the time for filing a compensation claim under the two-year statute commences to run when it becomes reasonably discoverable that

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[188] *Id.* at 813.

[189] *Id.* at 815.

[190] *Id.* at 813.

[191] *Id.* at 815.

[192] *Tabor Motor Co.*, 233 So. 2d at 814. The court later clarified this definition further by changing "compensable injury" to "disabling injury." Quaker Oats Co. v. Miller, 370 So. 2d 1363, 1366 (Miss. 1979).

> claimant has sustained a compensable injury and disability. The claim period runs from the time compensable injury becomes reasonably apparent.[193]

The court referred to this as a "latent" injury.[194] It could also be categorized as a case of misdiagnosis by the physicians, for the symptoms had occurred long before the ultimate diagnosis. Since the disability did not occur until November 15, 1966, and the court's language can be taken as saying that, on these facts, the two years ran from that date.

The ruling in *Tabor Motor* made new law in Mississippi, and the court overruled three earlier cases to the extent that their holdings or language conflicted with the rules set out above.[195]

2. *The Struthers Wells Extension: Continuing Need for Medical Benefits*

In *Struthers Wells-Gulfport, Inc. v. Bradford*,[196] the claimant was bitten on the ankle at work on December 2, 1968, by what she thought was a mosquito.[197] After bothersome symptoms persisted for the next 10 days, she obtained medical treatment.[198] A check of the premises revealed that the bite was probably from a brown recluse spider. Symptoms recurred periodically, and she saw the physician as late as April of 1970.[199] Not only were the bills paid by the employer, but before she left her employment in April of 1970, her employer assured her that reoccurrences would also be covered.[200] In April of 1970, the worker moved to another state, leaving her employment.[201] When symptoms recurred, she saw a physician in that state. She moved back to Mississippi in 1971 and resumed her former employment. She had additional medical bills, yet the insurance carrier rejected these charges. Severe recurrences later in 1971 and in 1972 led to a diagnosis in February of 1972 of vasculitis infection in the blood vessel. Prior to the diagnosis, she filed a claim with the commission for medical benefits, on December 9, 1971.[202]

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[193] *Tabor Motor*, 233 So. 2d at 817.

[194] *Id.* at 812.

[195] Childs v. Mississippi Indus. for the Blind, 184 So. 2d 872 (Miss. 1966); Modern Laundry v. Harrell, 150 So. 2d 409 (Miss. 1963); Thyer Mfg. Co. v. Keys, 108 So. 2d 876 (Miss. 1959). When the court originally discussed the two-year statute in Welborn v. Joe N. Miles & Sons Lumber Co., 97 So. 2d 734 (Miss. 1957), the worker raised the "discovery rule" argument. *Id.* at 736. The court did not rule on this issue due to the lack of causal connection between the work and the ailment. *Id.*

[196] 304 So. 2d 645 (Miss. 1974).

[197] *Struthers Wells*, 304 So. 2d at 646.

[198] *Id.* The claimant experienced nausea, headaches, and developed a kidney infection that her doctor attributed to the bite. *Id.*

[199] *Id.*

The court ruled that the commission erred in holding that the worker's December 9, 1971 claim was time-barred.[203] Although she knew early on about the spider bite in 1968, the court stated (as it did in *Tabor Motor*) that, as matter of law, the record showed that she had no way to know until much later of "the nature, seriousness and probable compensable character of the injury."[204] Her argument that assurances in 1970 of continuing coverage estopped the employer from asserting the two-year limitation bar became necessary.[205]

The significant extension of *Struthers Wells* lies in the fact that the claimant received "medical only" during the two years after her initial treatment *and* the claim was only for medical services needed after the first two years. The worker never asserted a "disability" in the sense of an incapacity to earn wages. Her *need for medical services*, which she could only now know were necessitated by the work injury, started the running of the two-year limitation period.[206]

Both *Tabor Motor* and *Struthers Wells* provide a means for circumventing the harsh rule of *Thyer Manufacturing* and

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[200] *Id.* at 647.

[201] *Id.* at 646.

[202] *Struthers Wells*, 304 So. 2d at 647.

[203] *Id.*

[204] *See supra* note 192 and accompanying text.

[205] *Struthers Wells*, 304 So. 2d at 648-49.

[206] *Id.* at 649. This is what the court spoke about in *Gibbs v. Bass* in 1959 and in *Barr v. Conoco Chemicals, Inc.* in 1982 as triggering the one-year limitation period as to needed *medical* services. *See supra* notes 19-25 and accompanying text and *infra* notes 337-350, 355-380 and accompanying text.

Speed Mechanical that "medical only" does not stop the running of the two-year limitation period. The court obviously sensed the unfairness of the rule created by those cases. This doctrine would have to stay in place even if the court chooses to alleviate some facets of the potential for unfairness by recognizing that the statutes exist side-by-side. That would also require that a B-31 be filed in "medical only" cases as discussed above.

3. *Not Until Progressive Deterioration Becomes Disabling*

A new dimension was added to the doctrine when the court ruled that the two-year limitation period did not begin running for a worker with a progressive deterioration until the condition became disabling. In *Pepsi Cola Bottling Co. v. Long,*[207] A worker was injured when he struck his head on a truck door on March 9, 1972. A subsequent medical examination on March 9, 1972, showed no serious injury. The employer provided medical services approximately three months after the accident.[208] The worker continued to have pain, but the ailment caused no loss of work time until more than two years after the incident and the examination,[209] at which time his symptoms kept him from working.[210] The progressive deterioration of a cervical disc caused disability on September 8, 1974.[211] The court did not bar the December, 1974 claim. The effect of the progressive deterioration manifested itself as disabling only in 1974. He then "learned of his true condition," and "acted with reasonable care and diligence in pursing compensation for his injury . . . ."[212] This case adds to *Tabor Motor* and *Struthers Wells* by refusing to bar a claim at a time the worker had no claim to file.

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[207] 362 So. 2d 182 (Miss. 1978).

[208] *Pepsi Cola,* 372 So. 2d at 183.

[209] *Id.* at 184.

[210] *Id.* The claimant testified that he experienced near blackouts driving the company truck. *Id.* These and other symptoms prompted him to seek medical attention. *Id.*

[211] *Id.*

[212] *Id.* at 185. The court recently dealt with a similar situation in *Georgia Pacific Corp. v. Taplin,* 586 So. 2d 823 (Miss. 1991). In this decision, the court followed its earlier reasoning from *Tabor Motors* and held that although the injured worker knew of his injury and continued to seek medical treatment, this knowledge "did not rise to the level of giving [the worker] notice of compensabili-

This trio of rulings may govern a hearing loss claim.[213] A claimant may notice symptoms at a time when there is no claim to file, but the hearing may deteriorate progressively until it ripens into a claim. The hearing loss claim is an even stronger candidate to escape the two-year bar due to the likelihood of continuing harmful exposure to noise in the workplace. The lulling factor may not be present, just as it was not a substantial factor in *Pepsi Cola*.

4. *Quaker Oats and the Clarified Rule*

In answering the novel question of whether the two year limitation period begins running only when the worker becomes aware of a workers' compensation law claim, the court in *Quaker Oats Co. v. Miller*,[214] offered "clarification" of its earlier rulings. The court noted that when earlier rulings used the language "compensable injury," it should be understood to mean a work-connected "disabling injury."[215] The court further stated that the use of "compensable" or "non-compensable" injury left the commission with the incorrect impression that the two-year limitation period began to run only when the claimant became aware of the compensable nature of his injury.

In *Quaker Oats*, a worker took a four month sick leave beginning March 30, 1973.[216] Two weeks following his return to work, in August of 1973, the worker left his employment due

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ty." *Id.* at 827. Following the claimant's work-related injury of August 8, 1983, he saw two physicians who assured him of his stability. *Id.* at 825. Persistent symptoms, however, caused the claimant to seek a specialist's opinion. The specialist performed surgery in August of 1985 and claimant filed his disability and medical claim on August 9, 1985. *Id.* The court considered critical to its ruling that the claimant's physician failed to notify him of the connection leading to compensability until several months following the injury. *Id.* at 827.

[213] *See* MISS. CODE ANN. § 71-3-17(c)(17) (1972 & Supp. 1992). This section provides scheduled benefits for permanent partial disability of up to forty weeks for one ear's loss and one hundred and fifty weeks for loss in both ears. *Id.*

[214] 370 So. 2d 1363 (Miss. 1979).

[215] *Quaker Oats*, 370 So. 2d at 1366.

[216] *Id.* at 1364.

to health problems caused by hypertension.[217] The worker did not file a claim until July 17, 1975, because he was unaware that his disability was compensable until so advised by his attorney.[218] The court reversed the commission's award and ruled that the worker's claim was time-barred.[219] The court noted that this case was distinguishable from earlier cases where the two-year limitation period did not begin to run because of the absence of manifestations of the disabling injury.[220] In *Quaker Oats*, the worker's four month sick leave made it abundantly clear that he was aware of his illness, was cognizant of its seriousness, and knew that the aggravation was "work-connected."[221] It was this awareness of these characteristics of the injury that began the two-year limitation period, not the awareness by a claimant that his injuries were compensable by law.

The court's clarified rule can be stated as follows: *The two-year period for filing a compensation claim begins to run when, by reasonable care and diligence, it is discoverable and apparent to the worker as a reasonable person, from the nature, seriousness and probable consequences of the injury, that a work-connected disabling injury has been sustained.*[222] This statement appears to cover cases of latent and misdiagnosed injuries. In case of a gradually developing, work-aggravated, progressive ailment of the type in *Quaker Oats*, the court said the two year limitation period ran from the date of worker's last extensive exposure to the employment conditions, when the medical advice and sick leave gave notice of work connection and when he became unable to earn due to the work-connected ailment.[223]

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[217] *Id.* The nature of the worker's job exposed him to intense heat on an assembly line. *Id.* During the early 1960's, the worker developed high blood pressure which reappeared in 1969. *Id.* As the worker's performance deteriorated, he took a leave of absence from work and eventually retired pursuant to a physician's advice. *Id.*

[218] *Id.* There was still an approximate nine month delay from the time the worker received his lawyer's advice until the time he filed his claim. *Id.*; *see supra* note 37 and accompanying text for a somewhat different explanation of when the thirty-day period begins for purpose of notice of injury to the employer. One factor in the worker's acquiring knowledge of a compensable disability was the advice of an attorney. Walker Mfg. Co. v. Pickens, 206 So. 2d 639, 640 (Miss. 1968).

[219] *Quaker Oats*, 370 So. 2d at 1366.

[220] *Id.* at 1365-66. Though the court summarized its prior holdings in similar cases, the court recognized a need for clarification. *Id.* at 1365 (citing Pepsi Cola Bottling Co. of Tupelo, Inc. v. Long, 362 So. 2d 182 (Miss. 1978); Straghers Wells-Gulfport, Inc. v. Bradford, 304 So. 2d 645 (Miss. 1974); and Tabor Motor Co. v. Garrard, 233 So. 2d 81 (Miss. 1977)).

[221] *Quaker Oats*, 370 So. 2d at 1366.

[222] This summarizes the court's rulings in *Quaker Oats*, *Pepsi Cola*, *Struthers*

Note that in *Taplin*, the court did not consider the claimant's knowledge of "disabling injury" as the key time, but the worker's "notice of compensability" based on what the physician told him was the operative factor.[224] The lulling effect of the physicians' advice who found nothing wrong with him was important to the *Taplin* court. This factor was absent in *Quaker Oats*; claimant's physician correctly diagnosed his ailment whereas Taplin's had not.[225]

III. THE ONE-YEAR LIMITATION

A. *Operation of the One-Year Statute*

Section 71-3-53 of the Mississippi Code[226] contains the

Wells and *Tabor Motor.*

[223] *Quaker Oats*, 370 So. 2d at 1366. An unusual aside in *Quaker Oats* was that the bar of the two-year limitation period was not raised before the hearing officer or the commission. *Id.* at 1365. The commission itself raised the issue and voted 2-1 that the claim was not barred because the worker was unaware of the compensable nature of the injury until a date within two years from the filing. *Id.* Had the commission not raised the issue, the court, on appeal, presumably would not have taken up the question at all, as a time limitation is an affirmative defense and not jurisdictional. *See supra* note 26.

[224] *Taplin*, 586 So. 2d at 827.

[225] *Quaker Oats*, 370 So. 2d at 1364.

[226] MISS. CODE ANN. §71-3-53 (1972 & Supp. 1992) reads:

> Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact, the commission may, at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall

one-year limitation. It operates in conjunction with section 71-3-37(7)[227] and the Mississippi Workers' Compensation Commission's Procedural Rule 17[228] and form B-31. Form B-31 is specified as the notice called for in section 71-3-37(7). The summary in the initial section of this article poses the relation

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> not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury; and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of injury, and any payment from any unpaid compensation in such manner and by such method as may be determined by the commission.

Id.

[227] MISS. CODE ANN. § 71-3-37(7) (1972 & Supp. 1992) reads:

> (7) Within thirty (30) days after the final payment of compensation has been made, the employer shall send to the commission a notice in accordance with a form prescribed by the commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of injury or death, and the date to which compensation has been paid. If the employer fails so to notify the commission within such time, the commission may assess against such employer a civil penalty in an amount not exceeding One Hundred Dollars ($100.00). No case shall be closed nor any penalty be assessed without notice to all parties interested and without giving to all such parties an opportunity to be heard.

Id.

[228] Mississippi Workers' Compensation Commission Procedural Rule 17 reads:

> REPORT OF PAYMENT AND SETTLEMENT RECEIPT. The requirement for the filing of Commission Form B-31, shall be deemed to have been met upon receipt by the Commission of such form, signed by the claimant, provided however, that the form so filed is in accordance with the requirements of Code Section 71-3-37(7)(Section 13(j) of Act) and contains the information specified therein. In the event Form B-31 is not signed by claimant, the undersigned form shall be filed in the Commission with notice of such filing given to the claimant. Should the original or any subsequent Form B-31 be filed that does not furnish all medical or other information required, another Form B-31 containing complete information shall be filed as soon as possible thereafter as provided in Code Section 71-3-37 (Section 13 of Act).
>
> This Rule shall be in force and effect on and after July 1, 1982.

Id. A previous form of this rule differed in that it required that an unsigned B-31 be sent by certified mail and in some other details. McLemore v. Jackson Tile Mfg. Co., 252 So. 2d 781, 783 (Miss. 1971).

of the one-year statute to the two-year statute.[229] Subsequent sections raise the question of whether the two statutory periods should exist side-by-side so that only the later-expiring period would bar a claim.[230] This approach would replace the regimen in which only one of the two statutes can apply to a given situation, often allowing the employer effectively to maneuver for the earlier-expiring to bar a claim. No language in either provision suggests that one of the provisions should displace the other. Moreover, allowing both provisions to operate is not uncommon in workers' compensation systems.

Recall that in two cases the court made the statements that the two-year provision was "tolled or erased"[231] and that it "ha[d] no application"[232] if disability benefits had been paid. In describing this approach, the above summary says:

> The one-year statute then becomes the governing provision. This means the one-year period could expire before the two-year period would have expired. A properly filed B-31 following the most recent payment for disability income benefits or medial services is necessary to start the running of the one-year period. A claim for additional benefits (medical or disability) is not time-barred within the one year after the B-31 was filed. A claim for additional benefits (medical or disability) is time-barred if it arises after the expiration of the one-year period. However, any further payment of benefits or furnishing or authorizing of medical services within the one year stops the running of the statutory period of limitations. A new one-year period will begin running only upon the proper filing of a B-31. At any point, failure to file the B-31 properly means that the one-year statute does not begin running.[233]

The summary sets out the mechanics of how the one-year[234] provision operates. The mechanics of the system are based on these principles:

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[229] *See supra* note 26 and accompanying text.

[230] *See supra* notes 91-120 and accompanying text.

[231] Brown v. F. W. Woolworth Co., 348 So. 2d 236, 240 (Miss. 1977).

[232] City of Kosciusko v. Graham, 419 So. 2d 1005 (Miss. 1982).

[233] *See* discussion *supra* pp. 521-23.

[234] One year is an arbitrarily chosen period of time, as would be so for any other specified period. The aim of workers' compensation statutes, generally, is to

1. Section 71-3-53 mandates that no case shall be closed without notice and an opportunity to be heard.

2. The commission as an administrative agency should have continuing supervision over a claim to make needed adjustments, demonstrating a fundamental distinction between a law court and this agency.

3. When benefits have been provided, either voluntarily or pursuant to an award, and there follows a period of dormancy in the seeking of benefits (in Mississippi, the arbitrarily selected time period is one year), the matter can be closed.

4. The foregoing result appears to be dictated primarily by the feeling that a recurrence after a year's dormancy is more likely to come from a cause different from the employment injury. Whether this comports with medical fact is problematical and may actually be a way of avoiding the task of finding whether the recurrence is from the employment injury. The avoidance may be to protect against stale claims, for the sake

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set a reasonable time for claims and further claims. Specific scientific or medical data is not available to inform the choice of time period after which there will be no further medical needs or effects on ability to earn. Mississippi's one-year period is on the short end of the scale. The "Model Act" sets a three-year time period:

> Section 26 (a). The right to compensation for disability shall be barred unless a claim therefor is filed within three years after the injury or last payment of compensation. The right to income benefits for death shall be barred unless a claim therefor is filed within three years after the death or within three years after the dependents know or by exercise of reasonable diligence should know the possible relationship for the death to the employment. However, in cases in which the nature of the injury or disease or its relationship to the employment is not known to the employee the time for filing claim shall not begin to run until (1) the employee knows or by exercise of reasonable diligence should know of the existence of the injury and its possible relationship to his employment and (2) sustains disability or incurs a scheduled physical loss under Section 16(c), (except paragraph (24)).
>
> (Author's note: "Compensation" is defined in § 2(k) to include medical services.)

Workmen's Compensation and Rehabilitation Law (Revised), The Council of State Governments, Lexington, Ky., reproduced at 4 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW app. H., pp. 631, 675 (1990).

of administrative convenience (of retaining files, etc.), or to give an employer or carrier assurance of no further liability.

5. If there is never a one-year period of dormancy in seeking benefits for an injury, the employer or insurance carrier can remain liable indefinitely, especially to provide medical benefits. Medical benefits are unlimited in time and amount in contrast to disability benefits which are limited both in time to 450 weeks in many cases and in overall amount to the overall dollar maximum which governs at the time.

6. The worker, having been deprived by workers' compensation of a right to redress by a common law action against the employer, should not be deprived of the statutory right to further workers' compensation benefits without being put on notice that a claim for further benefits may be barred by time unless asserted promptly. Elimination of the right without notice can be a deprivation of a right without due process of law. Normally, the B-31 is said to serve as a notice of potential loss of benefits.

To grasp the significance of the one-year period in which the commission is authorized to take action or further action, note these examples of when it may come into play.

(a) A worker to whom benefits are being paid pursuant to an order may have the benefits terminated or reduced due to an improvement in physical condition and wage-earning capacity.

(b) A worker to whom benefits are being paid voluntarily or pursuant to an order, or to whom benefits were paid voluntarily or pursuant to an order before they were stopped may have the benefits increased or resumed due to a decline in wage-earning capacity.

(c) In either situation above, the order may be needed due to its having become apparent that an earlier order was based upon a mistaken finding of fact.

(d) A worker to whom medical services were not provided and who feels a need for medical services may obtain an order for medical services or for additional medical services.

(e) A worker to whom medical services or disability benefits are being provided pursuant to an order may have the services or benefits reduced or terminated by a new order in a reopening.

(f) A worker whose claim was formally rejected by the commission or court may pursue the claim anew if there was a mistaken finding of fact or if conditions have changed since the rejection.

B. *Bar To Disability Benefits*

In the first case in which the court decided whether a claim for disability benefits was barred by the one-year statute, the court interpreted the vague and obscure provisions of the exact predecessor of sections 71-3-53 and 71-3-37(7).[235]

In *H. C. Moody & Sons v. Dedeaux*,[236] the claimant suffered an injury on March 6, 1950, and received payment of medical and disability benefits over the next seven weeks. A B-31 was filed on May 23, 1950. No further benefits were sought or paid until claimant filed an application for compensation on June 8, 1953. In this claim, the worker sought further disability benefits, seeking to prove the worsening condition of his foot, which permanently reduced his wage earning capacity. The court ruled that once the one-year expired after the filing of the B-31, a claim for additional disability benefits was barred by the exact predecessor of section 71-3-53 as a "statute of limitations."[237]

It was here that the court was called on to craft from uncertain statutes the rudiments of the one-year limitation program. This case's basic rule of the one-year statute as a bar has been followed consistently.[238] The case is especially significant for containing the interpretation of the mandate of notice before closing a claim.[239] Rejecting the worker's argument that a hearing must be scheduled of which he must have notice, the court chose a route more easily administered. The court held that no hearing was necessary, notice of opportunity to be heard sufficed, notice of the B-31 provided that opportunity, and that the worker must take affirmative action within one year to avail himself of the opportunity. The court stated that the procedure satisfied not only the statute's requirement, but also the worker's right to "due process." An exact source of the due process guarantee was not identified.

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[235] *See* MISS. CODE ANN. §§ 6998-27, -19(g) (1942).

[236] 79 So. 2d 225 (Miss. 1955).

[237] *H.C. Moody & Sons*, 79 So. 2d at 230.

[238] *See* Turnage v. Lally's Swimming Pool Co., 159 So. 2d 84, 85 (Miss. 1963) (holding claim barred by time may not be revived by authorization of additional medical benefits); Carter v. Wrecking Corp. of America, 107 So. 2d 116, 118 (Miss. 1958) (holding claims for further disability benefits barred).

[239] *H.C. Moody & Sons*, 79 So. 2d at 299-30.

In *H.C. Moody*, the employer paid the benefits voluntarily, and not pursuant to an award.[240] The court's opinion indicated no distinction in the worker's right to "reopen" the matter during the one year period based upon whether payments were voluntary or by award.

C. *Bar to Medical Benefits*

Section 71-3-53 of the Mississippi Code states that within the one-year period, the commission may issue a "compensation order," "increase or decrease such compensation or award compensation."[241] The statute then defined "compensation": "'Compensation' means the money allowance payable to an injured worker or his dependents as provided in this act, and includes funeral benefits provided therein."[242] Thus, in *H. C. Moody*, the court did not hesitate to bar a claim for disability benefits. In *Trehern v. Grafe Auto Co.*,[243] however, the worker contended that while a claim for disability benefits was barred, the claim for medical benefits was not even addressed by the statute.[244] "Compensation" was defined in terms which did not include medical services.[245] Moreover, the medical services provision said that benefits were to be provided "for such period as the nature of the injury or the process of recovery may require."[246]

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[240] *Id.* at 226.

[241] MISS. CODE ANN. § 71-3-53 (1972 & Supp. 1992).

[242] MISS. CODE ANN. § 6998-02(10) (1942); current version at MISS. CODE ANN. § 71-3-3(j) (1972 & Supp. 1992) ("act" was changed to "chapter").

[243] 100 So. 2d 786 (Miss. 1958).

[244] *Trehern*, 100 So. 2d at 787.

[245] *Id.* (citing MISS. CODE ANN. § 6998-02(10) (1942), *amended by* MISS. CODE ANN. § 71-3-3(j) (1972 & Supp. 1992).

In *Trehern*, the worker received medical and disability benefits for an injury which occurred on September 3, 1952.[247] A signed B-31 was filed on December 8, 1952.[248] No further benefits were sought or paid until the worker filed a claim on November 23, 1956, in which the worker sought additional medical services necessitated by his work injury four years earlier. The court ruled the claim time barred, citing both the one-year and the two-year statutes and without stating which statute applied.[249] Both periods had expired by the time the claim was filed.[250] The court noted that the language of the two-year statute could be understood as applying only to disability benefits because of the lack of specific limitation on claims for medical benefits.[251] Finding no real guidance in the Mississippi statues and citing a Florida case which applied a counterpart of the Mississippi two-year statute, not the reopening statute, the court decided that since Louisiana and Florida applied its limitations provisions to medical services,

> [T]he legislature of Mississippi intended to put some limit on the time when a claim for medical benefits could be filed and it seems reasonable to us that they intended to put the same limit as they did put on a claim for compensation . . . . If the Legislature intended to put a different period of limitation on the recovery of medical expenses, they should amend the compensation act and put such period on it as they think just and fair.[252]

The court's frustration with the vague statute shows through its brief opinion, for it never explained how "medical" was included in the bar of a claim for "compensation."

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[246] MISS. CODE ANN. § 6998-08(9) (1942), *amended by* MISS. CODE ANN. § 71-3-15(1) (1972 & Supp. 1992).

[247] *Trehern*, 100 So. 2d at 787. The worker was out of work for four weeks, and received medical and disability benefits totalling $135.42, all paid before December 8, 1952. *Id.*

[248] *Id.*

[249] *Id.* at 787-88.

[250] *Id.* at 787.

[251] *Id.* at 788.

[252] *Trehern*, 100 So. 2d at 788-89.

Trehern was a watershed decision, creating a gorge through which many of the subsequent limitations questions were required to pass. In fact, its oft-cited shadow of curtailing the right to continuing medical treatment hangs over much of the actual operation of the workers' compensation system. The employers or carriers are knowledgeable or well-advised about the expense of medical services needed for as long as the nature of the injury or the process of recovery may require. An almost overriding concern in many types of work injuries is curtailing the cost of future medical services. *Trehern* provided one pathway. It should be noted that the issue before the *Trehern* court was whether a claim for future medical was barred, not whether the two statutory limitations provisions existed side-by-side. The later-expiring of the two would have been the two-year period, which ended two years before the 1956 claim was filed, assuming that it began running in September of 1952. Thus, *Trehern* is consistent with the "later-expiring" approach and contains no mention of the two-year statute being inapplicable.

D. The Start of the One-Year Period

While the potency of the one-year period in barring a claim for further benefits was established in *H.C. Moody* and *Trehern*, that only begins the story. What sets the one-year clock ticking, what stops it, what restarts it, and what happens to those who fall between the cracks are the next chapters.

1. One Year After Rejection of a Claim

Section 71-3-53 of the Mississippi Code expressly allows further proceedings during the one-year period after rejection of a claim. In case of an appeal, the one year begins running when the appellate court rejects the claim. In so stating, the court has gone out of its way to point out the statutorily available procedure of filing a request to reopen the matter after rejection of the claim. Upon reopening, the claimant could submit evidence of causal connection between work and injury.[253] The court warned against an attempt to use reopening after rejection as an alternative to an appeal in *North Mississippi Medical Center v. Henton.*[254] In a case which appears to disregard the statutory ground of reopening for a mistaken determination[255] (as was mandated by the court itself in *Bailey Lumber Co. v. Mason*),[256] the court reversed a commission decision on reopening when no new evidence was presented at the reopened hearing, ruling the earlier rejection was res judicata.

2. *One Year After Last Payment*

The statute specifically authorizes supervision and further action by the commission during the "one (1) year after date of the last payment of compensation whether or not a compensation order has been issued . . . ."[257]

a. Voluntary Payment

In the early case of *H. C. Moody & Sons v. Dedeaux,*[258] the court assumed[259] that reopening was available during one year after voluntary payments, then held that the expiration of one year precluded reopening in that case.[260] Three years later, the court held similarly in *Trehern.* that the expiration of one year precluded reopening after voluntary payments.[261] In *Brown v. F. W. Woolworth Co.*,[262] the commission would have reopened after voluntary payments except that it thought the one year period had expired.[263] The court reversed the commission by holding that the one-year period had not expired,[264] leaving the commission free to reopen as the commission had already decided was appropriate.

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[253] Pryor v. Woodall Indus., Inc., 167 So. 2d 920, 922 (Miss. 1964); *see also* Day Detectives, Inc. v. Savell, 291 So. 2d 716, 717 (Miss. 1974) (holding evidence could be introduced for causal connection and extent of disability); American Potash & Chem. Corp. v. Rea, 228 So. 2d 867. 868 (Miss. 1969) (stating admissible evidence available for proof of cause and disability).

[254] 317 So. 2d 373 (Miss. 1975).

[255] Aetna Casualty & Surety Co. v. Espinosa, 469 So. 2d 64 (Miss. 1985). For an analysis of *Espinosa*, *see* John R. Bradley, "An Improper Reopening Under Section 71-3-53." 2 Workers' Compensation OUTLOOK, January-March, 1986. (Mississippi Workers' Compensation Commission).

[256] 401 So. 2d 696 (Miss. 1981). *See infra* note 286-88 and 292 and accompanying text.

[257] MISS. CODE ANN. § 71-3-53 (1972 & Supp. 1992).

[258] 79 So. 2d 225 (Miss. 1955).

[259] *H.C. Moody*, 79 So. 2d at 228. The court noted the commission's power to review a claim based upon a change in the claimant's condition or a mistake in a determination of fact. *Id.* at 227-28. The court then stated that both such circumstances had probably occurred. *Id.* at 228.

[260] *Id.* at 230.

In *Speed Mechanical, Inc. v. Taylor*,[265] the court made statements indicating that reopening is not available when the employer makes voluntary payments. The court stated that "there cannot be a 're-view' where there has been no first 'view'" and since "the instant case had never been before the Commission and obviously the Commission's award was not a review."[266] The statement must be regarded as an aberration, not an applicable rule.

Furthermore, the statute specifically allows review "whether or not a compensation order has been issued."[267] If that language does not include an instance of a voluntary payment, one wonders what it could mean. Numerous cases allow reopening after voluntary payments.[268]

b. *After Order Approving Lump Sum Payment*

Just as the commission has a continuing role following voluntary payments for benefits, the same is true if disability benefits are paid in a lump sum upon commission approval. Section 71-3-37 specifies that benefits normally be paid in installments every two weeks during the time such benefits are due,[269] whether they are paid voluntarily or pursuant to an order. That statute also provides that the commission can approve and order a lump sum payment to the employee.[270]

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[261] *Trehern*, 100 So. 2d at 788-89.

[262] 348 So. 2d 236 (Miss. 1977).

[263] *Brown*, 348 So .2d at 237. The commission held that, except for her claim being barred by the one-year statute, the claimant was entitled to benefits. *Id.*

[264] *Id.* at 239.

[265] 342 So. 2d 317 (Miss. 1977).

[266] *Speed Mechanical*, 342 So. 2d at 319-20.

[267] MISS. CODE ANN. § 71-3-53 (1972 & Supp. 1992).

[268] *See supra* note 175 and accompanying text.

[269] MISS. CODE ANN. § 71-3-37(2) (1972 & Supp. 1992). This section requires

The case which decided that the commission could order *additional disability benefits* after approving a lump sum payment was *Armstrong Tire & Rubber Co. v. Franks*.[271] After an injury on May 30, 1958, voluntary payments were made for the medical expenses and for the temporary disability.[272] The worker's petition of August 27, 1959, requested a lump sum payment for the fifty percent permanent loss of use of his arm and the employer agreed to payment. On September 1, 1959, the commission ordered the lump sum payment.[273] After payment of 100 weeks[274] of benefits in a lump sum, the employer filed a B-31 in September of 1959. The worker filed a claim on November 6, 1959, for additional disability income benefits, asserting that he actually had a one hundred percent loss of use of the arm.[275] The court agreed with the commission that the matter could be reopened to increase the award for disability benefits.[276] The court rejected the employer's contention that the order approving the lump sum payment effectively terminated the worker's right to a further claim, saying that the lump sum approval and payment did not have the effect of a contractual release precluding an additional award. The Form B-31 was said not to be contractual and that its function was to set the one-year period in motion.[277]

The case which decided that the commission could order *additional medical benefits* after approving a lump sum disability benefit payment was *J. H. Moon & Sons v. Hood*,[278] decid-

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that payments shall commence on the fourteenth day after the employer has notice and thereafter be paid every fourteen days unless the commission decides differently. *Id.*

[270] MISS. CODE ANN. § 71-3-37(10) (1972 & Supp. 1992).

[271] 137 So. 2d 141 (Miss. 1962).

[272] *Armstrong Tire*, 137 So. 2d at 142.

[273] *Id.* at 143.

[274] *Id.* at 149.

[275] *Id.* at 143-44.

[276] *Id.* at 144.

[277] *Armstrong Tire*, 137 So. 2d at 143.

[278] 144 So. 2d 782 (Miss. 1962).

ed nine months after *Armstrong Tire and Rubber*. The worker won an award in a controverted case and promptly petitioned for a lump sum payment of the disability benefits. The commission issued an order for such a payment on July 5, 1960.[279] Within a year after the payment, the worker filed a claim to compel the employer to continue to pay for medical services even after the employer had paid the maximum allowable for disability benefits.[280] Citing *Armstrong Tire & Rubber*, the court ruled that the obligation to provide medical services did not terminate when all disability payments had been made and that the commission had continuing power to award medical benefits.[281]

c. *After Order Approving Compromise in Exceptional Case*

The cases in the preceding section demonstrate that a lump sum payment does not preclude reopening for more medical and disability benefits. The question also arises whether a "9i compromise,"[282] approved pursuant to section 71-3-29,[283] coupled with a lump sum payment, shuts the door on reopening for more benefits. In *Dixon v. Green*,[284] the court affirmed the commission's denial of a reopening request made after a compromise, ruling that the commission did not abuse its discretion in declining to reopen. This made unnecessary a decision of whether the commission had the power to reopen a case after an approved compromise.[285] Twenty years later the court answered the question by directing a reopening in the exceptional circumstances presented in *Bailey Lumber Co. v. Mason*.[286]

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[279] *J.H. Moon & Sons*, 144 So. 2d at 782.

[280] *Id.* at 782-83.

[281] *Id.* at 782. In a 5-4 decision to the same effect, in Lawrin Co., Inc. v. Frazier, 213 So. 2d 548 (Miss. 1968), the matter was contentious only because the dissenters thought that the worker, having won an award for permanent total disability benefits when she declined surgery which might restore wage earning capacity (due to the risk involved), should be estopped when she later sought payment for such surgery after she had pocketed the approved, lump sum payment for total disability. *Id.* at 550-54 (Robertson, J., dissenting). The majority realized that the worker, having received permanent total disability benefits, now stood to regain wage-earning capacity from the surgery at the employer's expense and thus obtain more benefits than if the benefits had been obtained in the reverse order. Despite this possible gain to the worker, the court thought it more important to emphasize that a lump sum payment did not cut off the right to seek a reopening for additional medical benefits during the one-year period and followed *Armstrong Tire* and *J.H. Moon*. *Id.* at 549-50. In *Frazier*, if there had been no lump sum payment but periodic installments, and if during that time period the worker had obtained the surgery so that wage-earning capacity was restored, presumably the employer would have asked, under § 71-3-53, for a change in the commission's order of permanent total disability benefits, based upon a change in the worker's condition.

[282] 1948 Miss. Laws ch. 354, § 9(i), contained the provision for the compromise of a claim, and "9(i)" has persisted in the language used by many lawyers and others involved with workers' compensation.

[283] MISS. CODE ANN. (1972 & Supp. 1992). The provision remains in its origi-

In *Bailey Lumber Co.*, the court mandated a reopening on a request made during the one-year period after the compromise. In ruling that the commission abused its discretion in declining to reopen, the court noted the low-intelligence of the illiterate worker, the fact that he was not represented by counsel, and medical reports showing a more extensive disability were not revealed to the commission when the commission approved the compromise.[287] The court noted that the commission's approval did not guarantee protection of the worker's best interests and that the loss of wage earning capacity appeared to greatly exceed the 12 1/2% loss paid in the compromise.[288] Thus, the reopening request was justified by the procedural and substantive unfairness of the compromise.

Nearly ten years later in *Metal Trims Industries, Inc. v. Stovall*,[289] the court again ruled that the commission had (and properly exercised) the power to reopen a matter within a year after an approved compromise.[290] A mistake in a determination of fact was the basis for the reopening[291] just as in *Bailey Lumber Co.*, where the court quoted the Larson treatise saying,

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nal form except for the addition by amendment of a specific reference to a compromise in a death case. 1950 Miss. Laws ch. 412, § 7.

[284] 127 So. 2d 662 (Miss. 1961).

[285] *Dixon*, 127 So. 2d at 644.

[286] 401 So. 2d 696 (Miss. 1981).

[287] *Bailey Lumber Co.*, 401 So. 2d at 701.

[288] *Id.* at 703.

[289] 562 So. 2d 1293 (Miss. 1990).

[290] *Metal Trims*, 562 So. 2d at 1296-97.

[291] *Id.* at 1297.

"[t]he kind of mistake that will warrant reopening is ordinarily a mistake on the part of the fact finder, not on the part of one of the witnesses."[292] In *Metal Trims* the commission based the decision to reopen on the statutory ground that the "mistake in a determination of fact" was the *commission's mistake* in approving the comprise, *not the claimant's mistake* in agreeing to the compromise and the release.[293] The mistake was induced by inaccurate information that led the commission to approve the compromise, thinking that the claimant had reached maximum medical recovery and had only a permanent partial disability when, in fact, neither was so.[294] Evidence in support of the reopening request convinced the commission that these earlier findings were incorrect.[295]

Unlike the unrepresented, illiterate worker in *Bailey Lumber Co.*, the worker in *Metal Trims* had a lawyer at the time of the compromise.[296] But under the commission's ruling, it was not a question of whether the legal advice she had added to the efficacy of *her decision* to compromise. The compromise was brought into question (perhaps invalidated) by the mistake of fact induced by inaccurate medical information. The court did not make this distinction as clearly as did the commission, and referring to her decision, the court said "the attorney for Stovall was less than candid or complete in dealing with the Commission."[297]

The other statutory ground for reopening within the one-year period is "a change in conditions."[298] The question was raised recently of whether the commission has the power to reopen for that reason after an approved compromise.[299] The one-year statute in no way suggests such a limit on the commission's power, although the commission's discretion is necessarily based on the facts of the matter at hand. However, the responsibility of the commission to protect the rights of all parties argues (as does precedent elsewhere as indicated in the court's reference to the Larson treatise) in favor of as great a concern for changed conditions as for reconsidering other erroneous conclusions.

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[292] *Bailey Lumber Co.*, 401 So. 2d at 704. Curiously, although the Commission's order did cite *Bailey Lumber Co.*, *Metal Trims* did not cite *Bailey Lumber Co.*, which is the only other case ruling on the power to reopen after a compromise had been ruled on. *Cf.* Stovall v. Metal Trims Indus., Inc., MWCC No. 82-01002-C5464 (Sept. 25, 1987).

[293] *Metal Trims*, 562 So. 2d at 1297.

[294] *Id.* at 1295.

[295] *Id.* at 1294.

[296] *Id.* at 1295.

[297] *Id.* at 1297.

[298] MISS. CODE ANN. § 71-3-53 (1972 & Supp. 1992).

[299] Bickham v. Dept. of Mental Health, 592 So. 2d 96, 103 (Miss. 1991) (Rob-

Although the commission has power to reopen after a compromise, one could not assume that the commission would regularly grant a reopening for either more medical or disability benefits. A lawyer giving a worker advice on a compromise would have to assume that reopening would *not* be available to supplement previous payments unless the commission's order approving a compromise provided that it was not final, say as to medical services needed in the future.

d. After Providing Medical Benefits Only

The doctrines discussed above involve cases in which disability and medical benefits had been provided. The question arises about the start of the one-year period when only medical services have been provided. Section 71-3-37(7) calls for the notice of the B-31 after the "final payment of compensation," and section 71-3-53 refers to the commission's continuing supervision for one year after the "last payment of compensation." The statute states that " 'Compensation' means the money allowance payable to an injured worker or his dependents as provided in this chapter, and includes funeral benefits provided therein."[300] The court's interpretation of "compensation" for purposes of the one-year statute is that the definition, while *including* disability benefits, death benefits and funeral benefits, was *not limited* to those items, and included medical benefits as well.

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ertson, J., dissenting). The commission reopened on this ground, and the court disallowed an appeal at that stage as interlocutory. *Id.* at 98.

[300] MISS. CODE ANN. § 71-3-3(j) (1972 & Supp. 1992).

> The wording of the Mississippi statute, contrary to the contention of the appellants, does not define compensation as only the money payable to an injured worker or his dependents . . . . .
>
> For the reasons given above we are of the opinion that the payment of medical expenses is part of and is equivalent to the payment of compensation.[301]

On its face, it would seem clear that since the court decided "compensation" includes medical benefits for purposes of stopping and restarting the one-year period, then providing such services would have the same effect for purposes of initially starting the running of the one-year period. However, this is not exactly the form of the issue presented. The issue is as follows: *When medical benefits have been provided but no disability claim exists or has been paid, must the employer file a B-31 to set in motion the one-year period as notice to the worker that rights can be lost at the end of the period?*

This question is discussed in detail in the text above. That part of the article is incorporated here as well. There are other ways of expressing the same issue contained in the question posed above. One is to ask whether the employer could file a B-31 in such a situation and claim the protection of the one-year period, which expired before the two- year period. For example, assume an injury on March 1, 1990. Little or no time is missed from work so no claim exists for disability benefits. Medical services are provided until what is assumed to be a satisfactory recovery on May 1, 1990 and a B-31 is filed properly at that time in respect of the medical services. If a need for medical services arises on September 1, 1991, is the claim barred by the one-year statute?

The text above[302] suggests that neither statute displaces the other; they exist side-by-side, often running concurrently. Only the later-expiring should bar the claim. Section 71-3-37(7) should be understood as requiring notice by way of a B-31 after providing "medical only." It also says that while the court has never squarely addressed this issue, these four decisions,[303] especially in *Speed Mechanical Inc. v. Taylor*, produced a different result on a related question if not a direct ruling. The issue in those four cases[304] involved this different factual pattern. Assume again an injury on March 1, 1990. Little or no time is missed from work, so no claim exists for disability benefits. All needed medical services are provided voluntarily until March 1, 1992, the end of the two-year period. When a need arises after March 1, 1992, for further medical service, is the claim barred by the two-year statute, or is the claim timely because *no B-31 was filed* to start the running of the one-year period?

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[301] Graeber Bros. Inc. v. Taylor, 115 So. 2d 735, 740 (Miss. 1959). The ruling was that the payment for medical services during the one-year period stopped the running of the time and was a "payment of compensation" to require filing of a new B-31. *Id.* Six years later, the court reaffirmed this holding. Yazoo Mfg. Co. v. Schaffer, 179 So. 2d 784, 788 (Miss. 1965).

[302] *See supra* notes 102-113, 121-186 and accompanying text.

In none of the four cases was a B-31 filed, and the opinions never discussed the mandate of section 71-3-37(7) for the filing of that form as the required notice to the worker.[305] In all four cases, the court said the claims would be barred by the two-year statute. Does this mean that the employer has the *choice of*: (a) filing a B-31, as in the first hypothetical situation in order to have the claim barred by *the earlier-expiring one-year period*, or (b) not filing a B-31, as in *Speed Mechanical* and the second hypothetical situation in order to have the claim barred by *the earlier-expiring two-year period*?

The results of *Speed Mechanical*[306] and its three forerunners suggest that the employer does have the choice of the earlier-expiring period. Because that seems at odds with other, better-reasoned cases, with the statutory requirement of the notice before closing a case and with generally-accepted principles of interpreting the law in favor of, at the very least, a hearing on the merits, the text above suggests that the employer should not have that choice; the notice should be required in a "medical only" case; that only the later-expiring period should bar a claim.

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[303] Speed Mechanical, Inc. v. Taylor, 342 So. 2d 317 (Miss. 1977); Yazoo Mfg. Co. v. Schaffer, 179 So. 2d 784 (Miss. 1965) (if on remand injury was found to be new injury of May 1, 1960: Modern Laundry v. Harrell, 150 So. 2d 409 (Miss. 1963), *overruled by* Tabor Motor Co. v. Garrard, 233 So. 2d 811, 817 (Miss. 1970) (to extent that holding was inconsistent with "discovery rule" for latent injuries); Thyer Mfg. Co. v. Keys, 108 So. 2d 876 (Miss. 1959), *overruled by* Tabor Motor Co. v. Garrard, 233 So. 2d 811, 817 (Miss. 1970) (to extent that holding was inconsistent with "discovery rule" for latent injuries).

[304] *See supra* notes 121-180 and accompanying text.

[305] *See supra* notes 121-180 and accompanying text.

[306] *See supra* notes 152-180 and accompanying text. *Speed Mechanical* is singled out for criticism because, in context, it seems to be beyond the pale. I apologize if the remarks are intemperate.

On the one hand, this question seems to be unanswered because the court has never discussed it directly. But on the other hand, *Speed Mechanical* and its three forerunners suggest that no worker (or worker's lawyer) should rely on the need for a B-31 in a "medical only" case to start the running of the one-year period, but should be alert to the prospect of a claim being barred by the earlier-expiring two-year period.

3. After Filing B-31 Properly: Its Purpose and Mechanics

The function of the B-31 is to provide the notice required by section 71-3-37(7) before a worker's rights to benefits can be terminated. The court said such notice is also required for due process of law.[307] The commission's Form B-31 is provided for in its Procedural Rule 17[308] as the requisite notice. The proper filing of the B-31 triggers the running of the one-year period of section 71-3-53. Failure to file the B-31 at all, failure to file a new B-31 when needed, and failure to file the B-31 properly all have resulted in claims not being barred by the one-year statute.

The purpose of the B-31 is to send an unmistakably clear message to the worker that (a) the employer has made a formal declaration to the commission and to the worker that it considers its obligation at an end and (b) the worker is in jeopardy of losing his statutory rights to benefits by the passage of a year's time if the matter remains dormant for the next year. Because so much is riding on the worker's catching onto the significance of the notice, in one of its early rulings the court said, "[b]efore the statute begins to run there must be compliance with the *mandatory* provisions of Section 6998-19(g)."[309] Thus, in order to satisfy the requirements for properly filing a B-31, both the purpose and the mechanical procedures must be followed scrupulously. The proper steps and the pitfalls are described below.

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[307] *See supra* notes 236-239 and accompanying text. The "due process" guarantee was alluded to in *H.C. Moody* but has never been discussed in detail. In another early case, the court ruled that when the employer failed to file a B-31 at all after providing disability and medical benefits, the one-year period had not begun. James F. O'Neil, Inc. v. Livings, 98 So. 2d 148 (Miss. 1957).

[308] *See supra* note 228.

a. The employer must be in a position to make a good faith, formal representation to the commission and to the worker that it has an honest, substantiated belief that its obligation to provide benefits is at an end. In *Hale v. General Box Manufacturing Co.*, when the employer filed a B-31 on January 20, 1954, at a time when it "did not consider the payment made in December 1952 as a final payment,"[310] the B-31 did not set the one-year period in motion. The reason for such a requirement is obvious. Nothing less than the employee's statutory rights are on the line, not to mention the right to due process of law. To give effect to a B-31 which is filed less seriously is to visit upon an often unrepresented, unsophisticated worker a form of legal gamesmanship which should not be tolerated in any system of law. As mentioned, if a B-31 was filed at a time the employer-carrier knows or should know of a continuing need for medical services, that B-31 should not be effective to trigger the running of the one year. In *Hale*, the court disregarded it.[311] There should be a more certain way to deal with it much earlier. Thus, a motion to strike such a B-31 would be in order, either on the commission's own initiative[312] or the

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[309] Hale v. General Box Mfg. Co., 87 So. 2d 679, 680 (1956) (emphasis added). Section 6998-19(g) is the predecessor of § 71-3-37(7).

[310] *Id.* 87 So. 2d at 680.

[311] *See supra* note 100.

[312] Direction to the commission to act on its own initiative is found in the one-year statute itself as well as in MISS. CODE ANN. § 71-3-37(8) (1972 & Supp. 1992), which reads:

> The commission (a) may upon its own initiative at any time in a case in

worker's motion.

b. Procedural Rule 17 says that if the worker signs the completed B-31, its filing is effective upon its delivery to the commission. The one-year period begins at that time.

c. Procedural Rule 17 also makes provision for the many instances when the worker does not sign the Form B-31. The protocol for proper filing is for the employer to give the worker the opportunity to sign the form.[313] If the worker does not sign, the employer-carrier delivers two copies of the completed form to the commission, one for filing and one to be marked by the commission to show the date of the filing and then returned to the employer-carrier. The employer-carrier then sends a copy of the entire, completed form to the worker with a letter stating that the form has been filed with the commission as an indication that the employer considers its obligation to provide benefits as being at an end. Also, the employer-carrier is well advised to include in the letter a clear explanation that the worker has an opportunity to be heard before the case can be closed. But, the worker must assert that right within one-year. Otherwise, the matter will automatically be closed and the worker will have no further rights to disability or medical benefits.[314] It is not enough for the employer-carrier to send

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> which payments are being made without an award, and (b) shall in any case where right to compensation is controverted or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation or from the employer that the right to compensation is controverted or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, hold such hearings, and take such further action as it considers will properly protect the rights of all parties.

Id. The cases have not otherwise dealt with the question of the employer-carrier's duty to have a substantiated basis for filing a B-31.

[313] In *McLemore v. Jackson Tile Mfg. Co.*, 252 So. 2d 781 (Miss. 1971), the court said this was a requirement under Procedural Rule 17 which in effect referred to a worker's "refusal or negligence" to sign. Although the Rule no longer contains that language, it seems the wiser course to give the opportunity for the worker to sign, a precaution which is easy and relatively quick.

[314] In Brown v. F. W. Woolworth Co., 348 So. 2d 236 (Miss. 1977), the unsigned B-31 had multiple defects, and the court said "that notice did not state (1) that the case was being closed, or (2) that it was a final report and settlement, or (3) that it constituted a final receipt, or (4) that claimant had the right or

the form to the worker *before* it has been filed or simultaneously with the filing. That was one defect in the *Brown v. F.W. Woolworth Co.* procedure,[315] as it was in *McLemore.*[316] It is inadequate because the language of Rule 17 requires the employer-carrier to show the worker that it so firmly believes its obligation is at an end that it has already formally said so to the commission. That is, the requirement has a substantive basis much beyond the technical order of filing and notice.

d. When the employer-carrier files an unsigned form with the commission but sends no copy to the worker, filing does not constitute notice and does not put the one year in motion.[317] However, the commission has a practice which may have the effect of *curing the employer-carrier's failure to comply with the notice requirement.* When an unsigned B-31 is filed with the commission, the commission sends a copy to the worker along with its Form C-1, a form letter titled *"IMPORTANT NOTICE."*[318] After stating that the B-31 has been filed, the Form

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opportunity to be heard in the matter." *Id.* at 238. The B-31 prescribed by the commission at that time contained the titles, "Final Report & Settlement Receipt" and "Final Receipt." The carrier used a form which did not contain "Final," as is shown in the appendix to the opinion. Note that the commission's current form does not contain "Final" in either title; the word appears only in the legend at the top of the form as a reference to "final payment." The form continues to lack notice of the opportunity to be heard, but the letter can include it.

[315] *Id.* at 238.

[316] McLemore v. Jackson Tile Mfg. Co., 252 So. 2d 781 (Miss. 1971); *accord,* White Bros. Elec. Eng. v. Rape, 253 So. 2d 534 (Miss. 1971) (claim not barred by one-year when copy of Form B-31 simultaneously sent to worker with filing of original form with commission).

[317] *See, e.g.,* Nichols v. American Creosoting Co., 146 So. 2d 76 (Miss. 1962) (claim not barred 15 months after employer filed Form B-31 even though worker did not receive copy or sign form); Shainberg's Black & White Store v. Prothro, 118 So. 2d 826 (Miss. 1960) (worker's claim not barred though filed more than one year after employer filed unsigned B-31 because worker received only oral notice).

[318] The text of the notice reads:

> The Mississippi Workers' Compensation Commission has received a "Report of Payment and Settlement Receipt" form which has been filed in connection with your workers' compensation claim. For your information we are enclosing a copy of this report showing the date that it was received in this office. If no workers' compensation benefits are paid during the one year period following the date we received this form, your file

C-1 purports to establish the running of the one year from the date the B-31 was *received* by the commission. This is the rule if the B-31 was signed, but not so for an unsigned one. The statement could mislead a worker into not filing a claim, thinking it would be too late when tested by the filing date with the commission. However, the claim would be timely when tested by the date of notice to the worker. Moreover, the commission could feel it was estopped from recognizing the later date when its own form states an earlier date.

The Form C-1 appeared in the 1990 edition of the commission's booklet containing the statute, Rules and Forms, apparently having been revived after becoming obscure and only used by informal practice. Its use as early as 1959 is noted in *International Paper Co. v. Evans.*[319] In that case an unsigned B-31 was filed with the commission on December 4, 1958, after the worker refused to sign it and after the worker's attorney notified the carrier that additional medical expenses had been incurred and more would be needed in the future.[320] Disability and medical benefits had been provided for the April 29, 1953, injury pursuant to an order in a controverted case. The last disability payment was on November 4, 1958. A claim, filed on April 25, 1960, was not barred because the one-year period did not begin when the B-31 was sent to the worker for signature in November 1958 (refused), nor when it was filed with the commission on December 4, 1958. The worker was not notified by the carrier of its being filed. However, the commis-

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> will be closed and you may be denied any further workers' compensation benefits for this injury. This notice is for your information only. You are not required to respond. However, if you have any questions or require assistance concerning your claim, please contact the: (commission).

Mississippi Workers' Compensation Commission Form C-1 (rev. 4-1-89).

[319] 140 So. 2d 271 (Miss. 1962).

[320] The attorney was correct on this point as shown by International Paper Co. v. Evans, 293 So. 2d 12 (Miss. 1974), in which a 1970 award was affirmed for medical expenses from the 1953 injury which was the subject of the 1962 decision. The case also demonstrates the problem of the carrier policing the medical bills to separate services related to the work injury and those that are unrelated. The court disallowed the unrelated charges and ordered payment of the related charges. *Id.* at 13-14.

sion sent a copy of the unsigned form to the worker by letter of June 5, 1959.[321] The claim of April 25, 1960, was within one year after that form of notice, so the court never was required to answer the question of whether that notice fulfilled the requirements of section 71-3-37(7) and Procedural Rule 17.[322] Nevertheless, the court volunteered, "[w]e think the one-year period of limitation . . . did not begin to run until notice was given to the appellee that the Form B-31, properly filled out, had been filed with the commission; and that notice was not given until June 5, 1959."[323]

The provision of section 71-3-37(8)[324] may authorize the C-1 notice, as it directs the commission to take such "action as it considers will properly protect the rights of all parties."[325] By the same token, the commission could police the propriety of a B-31 by testing whether it is filed in good faith and with a substantiated basis by requiring information on the likelihood of whether more medical services or other benefits will be needed in the future. If the indications are contrary to the implicit representations that no more benefits will be needed, action by the commission would be in order, including notice to the worker.

e. Some minor inaccuracies in the content of the B-31 have been regarded as not detracting from its primary purpose and thus have been excused.[326] The statute requires that notice be given to the commission within 30 days after the last payment. Does filing the B-31, after that date, have the severe consequence that its filing cannot start the one-year period, or is the consequence a later start of the one-year plus exposure to the $100 penalty of section 71-3-37(7)? Although the claim was ruled not barred in *Hale v. General Box Manufacturing Co.*[327] for another reason, the court gave no indication that a B-31 filed thirteen months after the last payment would be impotent to start the one-year period.

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[321] *Evans*, 140 So. 2d at 273.

[322] Neither the statute nor Rule 17 required the employer to send the form to the worker. The statute requires the employer to give notice to the commission and the Rule requires that the form B-31 be sent to the worker.

[323] *Evans*, 140 So. 2d at 274-75.

[324] *See supra* note 311.

[325] MISS. CODE ANN. § 71-3-37(8) (1972 & Supp. 1992).

[326] *See, e.g.*, Carter v. Wrecking Corp. of America, 234 Miss. 559, 107 So. 2d 116 (1958) (several errors in amount and duration of payments shown in B-31 did not detract from its message of finality to worker even though corrections filed with commission were not sent to worker).

f. Section 71-3-37(7) mandates that "all parties interested" must be given notice and an opportunity to be heard before a case can be closed. The employer-carrier is well-advised to give the notice by a form of mail which requires a return receipt as an aid in proof of notice. Obviously, the injured worker or dependent in a death case is a party in interest. An attorney of record would appear to be also, so the safe course is to send the B-31 to both attorney and claimant.[328] A provider of medical services is also a party in interest whose right to maintain a claim has been recognized.[329] Although it is beyond the scope of this article, their rights cannot be cut off without proper procedures being followed, whether it involves the one-year statute or the compromise of a claim under section 71-3-29.

g. In the case of a minor who has no legal guardian, the one-year period does not begin running upon receipt of the B-31. At the earliest, the one-year period would begin when the person reached majority.[330]

h. The notice by way of the B-31 is for the purpose of informing the worker of the consequences of the passage of the one year's dormancy of the matter. On what date does the countdown of one year begin? *Staple Cotton Services Ass'n v.*

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[327] 87 So. 2d 679 (1956).

[328] *See, e.g.*, McLemore v. Jackson Tile Mfg. Co., 252 So. 2d 781 (Miss. 1971) (when defective B-31 was sent to worker but not to attorney, issue was raised as another reason B-31 was defective, but court said it never reached that question because of other defect in filing of B-31).

[329] *See, e.g.*, Mandle v. Kelley, 90 So. 2d 645 (Miss. 1956) (providers of services filed claim and worker later filed his own claim, which was consolidated as one case).

[330] *See, e.g.*, H.C. Moody & Sons v. Dedeaux, 79 So. 2d 225 (Miss. 1955) (court did not discuss whether notice to minor must be delivered again upon reaching majority in order for it to actually operate as "notice"); *accord*, Powe v. Jackson, 109 So. 2d 546 (Miss. 1956) (court held one year does not begin to run until minor employee reaches 21 years of age).

Russell[331] is a case in which the court held the one-year period did not begin: (1) when a B-31 was sent to the worker's attorney with a request for signature and return (May 3, 1977); nor (2) when the unsigned B-31 was sent (June 6, 1977) or delivered to the commission (June 9, 1977). The B-31 was sent by letter of June 16, 1977, to the worker's attorney with notice of its having been filed. A claim filed June 16, 1978, was ruled to be within one-year without the need for the court to ever decide whether *mailing* or *receipt* of the notice was the effective date to start the one-year. Actually, in order actually to give a year's notice, receipt seems to be the logical beginning time.[332] The employer-carrier already must be in a position to prove receipt of an unsigned B-31, so this does not impose a further or an unrealistic burden of proof.

E. What Interrupts or Stops the Running of the One Year

1. A Claim Within One Year

The paragraph just above describes a case in which the *timing* was close. As to what *form* a claim must take in order to satisfy the requirement, neither the statute nor the court has imposed a requirement of formality.[333] A letter from the worker to the commission on November 14, 1984, was ruled to be effective to stop the running of the one-year period which had been set in motion by a B-31 on August 4, 1984.[334] The letter gave notice of her injury (for which disability and medical services had been provided), her continuing problems from the injury and her need for help in tending to the matter. Even a later B-31 filed on December 13, 1984, did not cancel the effect of her letter from a month earlier. A claim filed on March 24, 1986, requesting specific benefits was not barred. The worker had also obtained further medical services after the B-31 was filed. The court said, "[t]he filing of the Preliminary Medical Report together with Harper's November 14, 1984, letter are a sufficient request and enforcement of payment so as to serve as a substitute for a formal petition to reopen."[335]

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[331] 399 So. 2d 224 (Miss. 1981).

[332] *Russell*, 399 So. 2d at 226. The court's language leaves some doubt:

> [T]he statute did not begin to run until claimant Russell was advised that the Form B-31 had been filed with the commission. This began with the letter to Russell dated June 16, 1977, and he had one full year after this date within which to file his claim with the commission.

Id.

[333] Mississippi Workers' Compensation Commission Procedural Rule 2 states that an employee controverts a cause initially by "a properly executed Mississippi Workers' Compensation Commission Form B-5,11." No particular form is specified for a petition or motion to reopen under the one-year provision. Form B-5,11 may be used, or a motion or petition setting forth the request may be used.

[334] Harper v. North Miss. Medical Center, 601 So. 2d 395 (Miss. 1992).

The court's approach seemed to be that the essential concerns of a statute of limitations were satisfied because: (1) the employer-carrier had prompt notice of the medical expense and (2) the worker independently sent a letter asking for help. With notice present and there being no sleeping on her rights, the opinion concluded that the claim should not be barred.[336]

2. *Providing Benefits After the B-31*

If the employer provides or authorizes medical services within a year after the B-31 becomes effective, this stops the running of the one-year period. One reason for this result is that such action or attitude negates the earlier message with the B-31 that the employer's obligation is at an end. Mechanically, providing benefits constitutes a new "final payment of compensation" under section 71-3-37(7) and also a new "last payment of compensation" under section 71-3-53. The rule was established in the early case of *Graeber Bros., Inc. v. Taylor*,[337] and reveals another instance in which the statute gave nothing more than a vague guide to how the issue of continuing need for medical services should be resolved. In making its ruling, the court decided that the word "compensation" as used in the exact predecessors of sections 71-3-37(7) and 71-3-

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[335] *Id.* at 398.

[336] *Id.* at 396-98.

[337] 115 So. 2d 735 (Miss. 1959), *sugg err. overruled* 117 So. 2d 469 (Miss. 1960).

53[338] included medical services.[339]

After an injury on September 13, 1956, benefits were provided and a B-31 was filed on November 14, 1956 by the carrier; a form B-77[340] showing more medical benefits was filed on July 10, 1957; the worker's claim for further benefits was filed on July 9, 1958. The court ruled the claim not barred by the one-year statute as the carrier insisted. Further medical services as reflected in the Form B-77 about seven months after the B-31 was filed "tolled the statute of limitations . . . .(and) the claimant was fully justified in believing his rights were being protected."[341] In another way, the court also noted the lulling effect of the carrier's providing the needed services:

> [T]he commission believed, and had every legal right to so believe, that the appellants fully recognized their duty and obligation to the claimant and intended to meet their obligation and that as a result of this belief the commission was prevented from taking active steps in order to fully advise the claimant of his rights under the statute.[342]

The impact of *Trehern v. Grafe Auto Co.*[343] in ruling that claims for further medical services could become time-barred in the same way as claims for disability benefits gave a sense of urgency to the *Graeber Bros.* issue.[344] The *Graeber Bros.* ruling recognized that the statute's promise of medical services for as long as needed could in fact be realized because medical services within the year tolled or stopped the running of the period. The language of the two statutes, referring as they do to the last or final payment of "compensation," already made this same result somewhat more predictable when further disability benefits had been provided.

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[338] *Graeber Bros.*, 115 So. 2d at 737 (quoting both provisions).

[339] *See supra* notes 300-02 and accompanying text.

[340] A form in use at that time to be filed semi-annually showing further payments for each open case. It differed from the current Form B-17.

[341] *Graeber Bros.*, 115 So. 2d at 736.

[342] *Id.* at 736-37.

[343] 100 So. 2d 786 (Miss. 1958).

[344] *See supra* notes 241-252 and accompanying text.

Later cases[345] established that each time medical expenses were incurred within one year after the filing of the B-31, a new B-31 must be filed properly in order to set a new one-year period in motion. The same is true for payment of disability benefits after a B-31 has been filed. The payment stops the running of the one-year period, and a new one-year period does not begin until a new B-31 has been filed properly. Obviously, this can occur over and over so that several B-31 forms may be filed.

As discussed below, the court pointed out in *Gibbs v. Bass*[346] and *Barr v. Conoco Chemicals, Inc.*[347] that a worker who has a need for medical services at least as often as every 12 months can keep the statute from barring a claim for more medical benefits. In *City of Kosciusko v. Graham*,[348] an award was made around 1980 for medical services for a 1964 injury and other benefits were being provided voluntarily. In *International Paper Co. v. Evans*,[349] an award was made in 1970 for medical services due to a 1953 injury. Note, however, that once the one-year has expired, a later act by the employer of providing medical services does not remove the bar.[350]

3. *Obtaining Medical Services*

In *Nevel v. Guerdon Industries, Inc.*,[351] the Mississippi Workers' Compensations Commission ruled that a claim was not barred by the one-year statute of section 71-3-53 when the worker obtained needed medical treatment within one year after the filing of Form B-31, even though the claim was not filed until more than one year after the B-31 had been filed. After suffering from leg injuries on June 5, 1985, Nevel received disability and medical benefits. He returned to work in November 1985. Although the worker was not represented and was illiterate, a signed B-31 was properly filed on January 28, 1986. Upon recurrence of a problem with his knee, he again saw the physician for treatment from January 7, 1987, through February 19, 1987. The physician, who attributed the problems to the earlier work injury, performed arthroscopic surgery. No benefits were paid after the filing of the B-31 on January 28, 1986. This claim for more benefits (due to a change in condition) was filed on January 20, 1988.

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[345] Chronologically, Shainberg's Blacks & White Stores v. Prothro, 118 So. 2d 862 (Miss. 1960) (B-31 was filed in 1954, another in 1955 and third in 1956; last one was defective so claim in 1958 was not barred); Yazoo Mfg. Co. v. Schaffer, 179 So. 2d 784 (Miss. 1965) (medical services on May 1, 1960, negated effect of signed B-31 of February 18, 1960, so claim of October 31, 1962, was not barred).

[346] 116 So. 2d 542 (Miss. 1959).

[347] 412 So. 2d 1193 (Miss. 1982).

[348] 419 So. 2d 1005 (Miss. 1982).

[349] 293 So. 2d 12 (Miss. 1974).

[350] Turnage v. Lally's Swimming Pool Co., 159 So. 2d 84 (Miss. 1963).

[351] MWCC no. 85 06756-D-3910 (January 12, 1990).

In ruling that the claim was not barred by the one-year provision of section 71-3-53, the commission stated that *incurring a needed medical expense within one year after the B-31 stopped the running of the one-year period. It was not necessary that the claim be filed before the end of the one year, only that the expense had been incurred within that time.*

The commission rejected the argument that only the filing of the claim within one year would prevent the bar, citing language from other cases to support its reasoning. The contrary result was explained as inconsistent with the fundamental interaction of sections 71-3-37 (7) and 71-3-53 and Procedural Rule 17.

Though not cited in *Nevels*, two earlier commission decisions are consistent with its reasoning and result. In *Yielding v. Super Sagless Corp.*,[352] a claim filed with the commission more than one year after the B-31 was filed was not barred. The claimant had both incurred medical expense *and* sent the medical bills to the carrier within the one year. The commission reasoned:

> To hold that the [one-year] statute of limitations is not tolled until claimant files a formal pleading with the commission is contrary to the express language of *Barr v. Conoco Chemicals, Inc.* It is also contrary to policy considerations such as the rehabilitative purpose of the Act and the liberal allowance of medical benefits . . . . The concept of judicial economy also

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[352] MWCC no. 79 05462-B-9845 (April 3, 1986).

> dictates that a claimant should be able to toll the one-year statute of limitations without controverting the right to payment for every medical expense incurred within one year after the filing of a Form B-31.[353]

This cogent explanation in *Yielding*, in which the carrier had notice of medical bills within the one year—unlike *Nevels*—applies to facts as in *Nevels* as well. The commission recognized that fortuitous timing within the twelve-month period should not operate to surprise a worker whose need for medical services occurred in the latter part of the period. The commission stated:

> To hold otherwise would allow a carrier to receive notice of a claim for medical treatment and hold it until twelve months had passed and then reject the payment and claim that the statute of limitations has run. This could cause chaos in the entire workers' compensation system and defeat the purposes of the Act. Unknowledgeable claimants would have no way of knowing whether their claim for medical treatment would be accepted or not. Whereas, notice to a claimant of a rejection would give him an opportunity to file a timely request for a hearing on the question of the payment of medical services.[354]

The commission's statement that "notice to a claimant of a rejection would give him an opportunity to file a timely request for a hearing" repeats a theme brought up in *Gibbs* and *Barr*, two cases discussed below. The concept has not yet developed in the way the references to it suggest—as a time for beginning a one-year limitation period. Its other premise is that incurring medical expense stops the running of a one-year period. The court has made no direct ruling to this effect.

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[353] *Id.*, pp. 6-7 of Order.

[354] *Id.*, p.7 of Order. *See also* McCauley v. North Mississippi Medical Center, MWCC no. 84 14106-C-7016 (April 29, 1986) (claim filed more than one year after B-31 was not barred when medical expense had been incurred and both carrier and commission had been notified of bills within one year). Although the court took a different tack in Harper v. North Mississippi Medical Center, 601 So. 2d 395 (Miss. 1992) in ruling a claim not barred, it could have decided that her incurring medical expenses within a year after the B-31 stopped the running of the period. *See supra* notes 333-336 and accompanying text.

4. *Continuing Need for Medical Services*

a. Barr v. Conoco

A problem which has caused the court to doubt that justice has been done is the time-barring of claims for medical services which were needed because of a work injury. Both the problem and the tension are well illustrated in *Barr v. Conoco Chemicals, Inc.*[355] After an injury on August 28, 1975, for which medical and disability benefits were provided, the worker filed a claim on June 6, 1976, for further benefits. The claim was resolved by a commission order approving a lump sum payment for the loss of the leg. A B-31 was filed on September 6, 1977, showing the lump sum payment. When the artificial leg, which had been provided earlier as part of the medical services, needed to be replaced (as is customary), the worker's request was denied by the employer and carrier. The worker filed a claim on October 8, 1979, for this further, needed medical service.[356]

Disagreeing with the commission, the supreme court ruled that the one-year statute barred a claim after September 6, 1978, including this claim for medical services undisputedly made necessary by the work injury.[357] The court (1) expressed its distaste with the result that its earlier decision in *Trehern* imposed on this case; (2) lamented its inability to be freed from the result of *Trehern*, which here barred a claim before the need arose; (3) said the best rule would be that medical benefits would always be available and time-barred only by failure to file a claim within a year after a request for medical services was denied; and (4) said that a change was within the legislature's province, not the court's.[358]

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[355] 412 So. 2d. 1193 (Miss. 1982).

[356] *Barr*, 412 So. 2d at 1193.

[357] *Id.* at 1196.

[358] *Id.* at 1195-96.

b. A Checkered Record

In the *City of Kosciusko*[359] and *Evans*[360] cases, Ernest Graham and Sanford Evans successfully claimed the promise of section 71-3-15(1) of medical services for as long "as the nature of the injury or the process of recovery may require."[361] Juxtaposed with their success is the disappointment of Wesley Taylor,[362] James Barr[363] and Odell Mitchell,[364] all of whom found their claims for further medical services time-barred. Also to be reckoned is the anxiety and precarious situation of Frank Gibbs[365] who met with a rebuff when the court said the commission must decline Gibbs' request for a declaratory order to hold off the expiration of the one-year period. The court stated that "until there shall have been a default in the furnishing . . . of medical services and supplies . . . , the statute of limitations would not begin to run."[366] Taylor, Barr and Mitchell later would find little comfort in the court's assurance to Frank Gibbs against being:

> unduly fearful in regard to his future rights for medical services and supplies becoming barred at the time of the expiration of the [one-year] statute of limitations . . . since this statute will be tolled during such periods as the appellees shall continue to furnish such medical services and supplies, during such period as the nature of the injury or the process of recovery may require.[367]

The case law barring claims for needed medical services produces these results:

1. A worker such as the quadriplegic Ernest Graham,

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[359] *City of Kosciusko*, 419 So. 2d at 1007-08.

[360] *Evans*, 140 So. 2d at 274-75.

[361] MISS. CODE ANN. § 71-3-15(1) (1972 & Supp. 1992).

[362] *Speed Mechanical, Inc.*, 342 So. 2d at 320 (*see supra* notes 150-179 and 301-304 and accompanying text).

[363] *Barr*, 412 So. 2d at 1196.

[364] *Benoit Elevator Co.*, 485 So. 2d at 1070.

[365] *Gibbs*, 116 So. 2d at 543-45.

[366] *Id.* at 544.

[367] *Id.* at 544-45.

who has a continuous need for medical services, will never lose medical benefits by a time bar. At no time could the employer file a B-31 saying there was a good faith belief that no more services would be needed.

2. A worker who "needs" *and* obtains medical services because of the work injury at least once every twelve months can prevent the one-year from barring a continuing need for medical services. However, the rule of *Speed Mechanical, Inc.* denies this treatment if the worker has received medical benefits only. This denial occurred when the court ruled the claim barred by the two-year statute. It would not have been barred if the employer is required to file a B-31 after providing "medical only."[368]

3. A worker who does not obtain medical services at least every twelve months will find a claim time-barred no matter how clear the connection between the work injury and the needed services. This means that a claim can be time-barred before it comes into existence.

c. *Attempted Cures*

The statute did not dictate the court's choices along the way that have led to the these results. The statute's vagueness allowed the court to wander into the predicament. Even the method which can protect a worker's right (except in the "medical only" case) of obtaining medical services needed on account of the work injury at least every twelve months does not necessarily comport with good policy. In practice, it sends the person for services whether really needed or not, encouraging inefficiency at best. While it protects the most severe cases of regular need, it also can limit protection to the crafty. The less crafty, the more forgetful about details and the worker willing to do without services until the need is acute are cut off from the promise of continuing medical services on a ground unrelated to the fundamental reason for a statute of limitations. The cases contain the following specific suggestions to alleviate the seemingly harsh results and bad policy:

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[368] *See supra* notes 121-185 and accompanying text.

1. Hearing the *Gibbs* arguments on the very day of deciding *Graeber Bros.*, the court showed uneasiness about the *Trehern-Graeber* consequences. The court's 1959 solution, quoted in the section just above, was that the one-year statute would not be set in motion until the employer declined to furnish medical services requested by the injured workers.[369] This has not been developed further.

2. Twenty-three years later in *Barr*, the court realized that its generous assurance in *Gibbs* had failed to protect James Barr's need for a replacement prosthesis. Essentially, the court repeated its belief in the *Gibbs* plan but said the legislature must alleviate the *Trehern* consequences:

> We think that the best rule would be for the claimant to petition for medical benefits when there is a need for same and to prove the connection between his injury and the necessity for benefits. In the event the employer/carrier decline to furnish same, this will amount to default, and the claimant will have one year from that default in which to enforce the payment of same. However, this is a matter which must be addressed by the Legislature through appropriate action.[370]

3. The rule that the two-year period began only when the worker should know of the disabling consequences of the injury operated in *Struthers Wells-Gulfport, Inc.*[371] to protect the worker's claim for medical services. That same rule would prevent the B-31 having the effect of setting the *one-year* limitation period in motion before the injured worker had reason to know that further medical services would be needed. The circuit court judge in *Benoit Elevator Co.*,[372] ruled this way after concluding that any "interpretation of the law resulting in the failure of persons such as Odell Mitchell to receive compensation for latent medical injury would indeed be unjust."[373]

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[369] *Gibbs*, 116 So. 2d at 544.

[370] *Barr*, 412 So. 2d at 1196.

[371] *Struthers Wells-Gulfport, Inc.*, 304 So. 2d at 649 (*see supra* notes 177, 196-206 and accompanying text).

[372] 485 So. 2d 1068 (Miss. 1986).

[373] Circuit Court Order, Record at 133, Benoit Elevator Co. v. Mitchell, 485 So.

This approach is consistent with the supreme court's suggestions in the two previous paragraphs. Instead of rejecting this approach, the court kept it alive as a possible solution by ruling that based on those facts the worker should have known much earlier that he had a disabling injury.

4. The solution which was unsuccessfully proposed in *Trehern*[374] was that a claim for medical services could not be time-barred by the one-year statute, at least so long as it was presented promptly after the need was apparent, as he had done.[375] A related but less sweeping conclusion was reached by the commission in *Speed Mechanical, Inc.*,[376] in its ruling that while the *two-year statute* could bar a disability benefits claim, it did not apply to a claim for medical benefits.[377] However, the court reversed the commission's ruling.[378]

5. The *Gibbs v. Bass* proposal of a declaratory order that the one-year not be set in motion, though rejected, suggests an alternative course. When the B-31 is filed, it contains an implicit statement by the employer that "the final payment of compensation has been made." If the worker or the commission believes that further medical services may be needed, either could controvert the conclusion of final payment, perhaps with a motion to strike the B-31.[379] This comes almost full circle from *H.C. Moody & Sons* in 1955, when Dedeaux urged that only after a hearing could he lose his right to present a claim.[380]

2d 1068 (Miss. 1986) (No. 55,344).

[374] *Trehern*, 100 So. 2d at 787.

[375] *Trehern*, 100 So. 2d at 787.

[376] *Speed Mechanical, Inc.*, 342 So. 2d at 318 (*see supra* notes 152-171 and accompanying text).

[377] *Id.*

[378] *Id.* at 320.

[379] MISS. CODE ANN. § 71-3-37 (8) (1972 & Supp. 1992) (*see supra* notes 311, 324 and accompanying text).

[380] *H.C. Moody & Sons*, 79 So. 2d at 229.

IV. CONCLUSION

Faced with the task of fashioning a program of time limitations from vague statutes, the court made many right steps along the way to promote the purposes of the Workers' Compensation Law. We can see clearly that the court sensed in *Gibbs* that it had moved into quicksand and was uncertain of the way out. We should be willing to acknowledge the court's many wise choices and concede its bad ones. Less understandable is the court's expression in *Barr* that only the legislature could extricate the limitations program from the results which have been lamented as unfair to deserving workers. One cannot help but face the fact that the legislation, unclear and scanty, gave the job to the court in the first place. The court should be willing to continue the task of trying to make more out of the sow's ear of a statute than the gunnysack that now exists. Indeed, the court's tradition in workers' compensation decisions has been to revise earlier attempts which create conflicting precedents or results which cry out for improvement.

In 1968 in *Cockrell Banana Co. v. Harris*,[381] the court overruled one line of cases in favor of conflicting rulings which better served the workers' compensation system. It did so again in 1989 in *Stuart Manufacturing Co. v. Brown*,[382] this time overruling at least 13 prior cases in order to embrace a group of decisions that seemed sounder. As mentioned, in 1970 in *Tabor Motor Co. v. Garrard*,[383] the court overruled earlier decisions in favor of what it deemed a better policy. In 1992 in *Smith v. Jackson Construction Co.*,[384] the court overruled a line of cases going back 40 years, frankly admitting that the earlier decisions were wrongly decided. Again, the court should step forward to cure the problems created by a few of its decisions and some of its dictum. In doing so, the court would be seeking an interpretation of the statute which, when tested by experience, would better serve the polices of the law than some of the earlier choices. Among the better choices are the following:

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[381] 212 So. 2d 581 (Miss. 1968) (timing and other details of reduction of benefits for preexisting condition).

[382] 543 So. 2d 649 (Miss. 1989) (type of preexisting condition which triggered reduction of benefits).

[383] 233 So. 2d 811 (Miss. 1970) (when two-year period begins for certain injuries).

[384] 607 So. 2d 1119 (Miss. 1992). The court found that the benefit schedule does not apply if scheduled member injury causes total disability. *Id.* The majority's concurring opinion expressly rejected the notion that the court's longstanding rulings could be changed only by the legislature. *Id.* at 1130-31 (Robertson, J., concurring).

1. Both the one-year statute and the two-year statute apply to claims for benefits. Nothing in the statute says that either displaces the other. They exist side-by-side as is common in workers' compensation. A claim can be barred only by the later-expiring period.

2. When only medical benefits (as opposed to disability benefits also) have been provided, notice must be given to the worker by Form B-31 in order to set the one-year period in motion. In this respect, a "medical only" case is governed by the same statutes and rules that apply when disability benefits have been provided.

3. The all-important "notice" contained in the Form B-31 should be designed realistically to contain a clear message to the worker of the actual meaning and consequences of the "form." At another level, the choice should be reconsidered of whether the *Trehern* decision that "medical" is "compensation" and thus can be barred is a wise choice. The commission decided in *Speed Mechanical* that the two-year statute did not bar medical. That conclusion fits comfortably with the statutory assurance of medical services for as long as needed and could replace the time bars both in *Trehern* and *Speed Mechanical.* The *Gibbs* and *Barr* proposal[385] could then be revived as the means of barring medical claims for one who slept too long on statutory rights.

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[385] *See supra* notes 81, 355-369 and accompanying text.

REOPENING AND DUE PROCESS IN CLAIMS REVIEW

James E. Higginbotham, II[1]

I. INTRODUCTION

An administrative law judge in workers' compensation cases deals primarily with contested claims, conducting hearings and making findings of fact and conclusions of law based upon the record. The proper dispatch of these duties has become perplexing in the aftermath of several recent decisions of the Mississippi Supreme Court. These cases address the obligations of the Mississippi Workers' Compensation Commission (Commission) in its fact-finding capacity, and in its exercise of discretion in reviewing decisions under section 71-3-53 of the Mississippi Workers' Compensation Act (MWCA).[2] *Douglas & Lomason Co. v. Freeman*[3] suggested a relationship between these two subjects, establishing the Commission's "final judgment" as the dividing line for evaluating the Commission's proper exercise of discretion in each circumstance.[4] This article will discuss reopening workers' compensation cases before and after final judgment as applied in *Freeman*.

A. *Post-Final Judgment—Section 71-3-53*

All workers' compensation lawyers are aware of the reopening authority granted to the Commission by section 71-3-53. Basically, section 71-3-53 allows the Commission, on its own initiative or upon application of a party in interest, to review and revise its prior decisions for up to one year after the last payment of compensation or rejection of a claim.[5] Section 71-3-53 limits the Commission's right to review and revise prior decisions to either instances involving: (1) "a change in conditions" or (2) "a mistake in the determination of fact."[6] If either of these is found, the Commission may retroactively amend its prior decision to correspond with the facts and other limitations of section 71-3-53.[7] The court has long recognized that section 71-3-53 authorizes the Commission to review and amend its prior decisions in circumvention of any claim of res judicata or "law of the case."[8] The authority of review extends to cases in which payment is being made without a Commission order.[9] This discussion of section 71-3-53 will be limited to its impact on litigated claims, and will not consider the time-bar features of this, or any other Section.

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[1] Administrative Law Judge, Mississippi Workers' Compensation Commission.

[2] *See* Douglas & Lomason Co. v. Freeman, 590 So. 2d 124, 128 (Miss. 1991); Staples v. Blue Cross & Blue Shield, 585 So. 2d 747, 748-49 (Miss. 1991); Metal Trims Indus., Inc. v. Stovall, 562 So. 2d 1293, 1296 (Miss. 1990).

[3] 590 So. 2d 124 (Miss. 1991).

[4] *Freeman*, 590 So. 2d at 128.

B. Pre-Final Judgment—Procedural Due Process

In recent decisions[10] the court has directed itself to further defining the limits of section 71-3-53, and to clarify matters of procedural due process and the Commission's obligation to insure full development of all issues submitted for decision. A fair hearing allowing the court the opportunity to fully address the issues is fundamental to the system. However, pursuance of this right to a fair hearing is often confused with the right to reopen under Section 71-3-53. This section allows reopening of a case to adjust "prior" decisions. However, practitioners consistently move to reopen "pending" cases based on section 71-3-53.[11] To further complicate the confusion past case law tended to equate any reopening with section 71-3-53. Therefore, it should come as no surprise that the court has found it necessary to distinguish between section 71-3-53, post-final judgment review, and other types of reopening, such as the new receipt of evidence in pending litigation.

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[5] MISS. CODE ANN. § 71-3-53 (1972) must be read in conjunction with MISS. CODE ANN. § 71-3-37(7) (1972), which requires that no claim be closed without notice to all parties, affording them an opportunity to be heard. McLemore v. Jackson Tile Mfg. Co., 252 So. 2d 781, 782 (Miss. 1971).

[6] MISS. CODE ANN. § 71-3-53 (1972).

[7] *Id.*

[8] *See* Roling v. Hatten & Davis Lumber Co., 85 So. 2d 486, 490 (Miss. 1956).

[9] Armstrong Tire & Rubber Co. v. Franks, 137 So. 2d 141, 145 (Miss. 1962).

[10] *See supra* note 1.

[11] *See* Davis v. Scotch Plywood Co. of Miss., 505 So. 2d 1192, 1197-98 (Miss. 1987) (motion to introduce medical test result was made within twenty days of

C. *Freeman*—The Distinction

The court framed this distinction in *Freeman* which addressed whether the Commission abused its discretion by failing to remand a matter which effectively excluded critical testimony on the ultimate issue.[12] The court observed that:

> [t]he question of reopening now is different from reopening under 71-3-53. The question here is not whether the Commission should allow reopening after final judgment has been entered, but whether it should have permitted reopening after the evidence was closed and before it entered final judgment. The right to reopen in such a situation is within the discretion of the Commission.[13]

The distinction, however, is not entirely valid, since reopening under section 71-3-53 is also within the Commission's discretion.[14] The true distinction considers pre-final judgment due process versus post final judgment review and reconsideration.

In pre-final judgment due process, the discretion includes an obligation of the Commission to allow the parties to place before it all reliable evidence bearing on the ultimate issue.

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award of temporary disability benefits and denial of permanent disability benefits); Bennett v. United Parcel Serv., 382 So. 2d 469, 472 (Miss. 1980) (motion to reopen was granted upon Commission finding that claimant had not yet achieved maximum medical recovery and was in need of further medical treatment); American Potash & Chem. Corp. v. Rea, 228 So. 2d 867, 868 (Miss. 1969) (motion to correct record as to time claimant worked prior to was filed during appeal period following referee decisions); Estate of West v. Southern Bell Tel. & Tel., 90 So. 2d 1, 2 (Miss. 1956) (motion to reopen was filed while appeal of referee's decision was pending before Full Commission); *Roling*, 85 So. 2d at 490 (motion for reconsideration was filed while employer was making permanent partial disability benefit payments pursuant to Commission award).

[12] *Freeman*, 590 So. 2d at 128.

[13] *Id.*

[14] North Miss. Med. Ctr. v. Henton, 317 So. 2d 373, 375 (Miss. 1975).

This goes to the heart of the Commission's adjudicatory function, insuring that decisions are well considered. In post-final judgment review, although the discretion to reconsider a decision is often a matter of "justice" and/or "fairness," the Commission's exercise of this discretion must be supported by evidence of a "change in conditions" or "a mistake in the determination of fact."[15] The court in *Freeman* reminds the Commission to exercise broader discretion at the hearing phase prior to final judgment in order to facilitate a full disclosure of all facts relevant to the controversy.[16]

D. *Additional Statutory Reopening Authority*

Before proceeding, the reader should be aware of other MWCA statutes that allow reopening, which are subject to consideration in this article. For instance, section 71-3-17(c)(25) provides for reconsideration of impairment in whole body injury cases[17] Other statutes empower the Commission to make such investigations, conduct such hearings, and take such actions upon cessation of the payments or controversion of claims as "will properly protect the rights of all parties."[18] Further, the Commission can investigate of claims "as it deems necessary,"[19] and conduct such investigations and hearings without formal rules of evidence and procedure, in order to best ascertain the rights of the parties.[20] At one time, the court has invoked each of these as mandatory authority for reopening both before and after final judgment, but the most legitimate "reopening" device is found in 71-3-17(c)(25), which makes it possible for the Commission to award permanent disability benefits without the inordinate delays associated with the fear that the precise degree of impairment may not currently be apparent.[21]

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[15] MISS. CODE ANN. § 71-3-53 (1972).

[16] *See Freeman*, 590 So. 2d at 128 (court distinguished between reopening before and after Commission has entered final judgment, holding that former is within discretion of Commission) (citing Smith v. Container Gen. Corp., 530 So. 2d 1019, 1023 (Miss. 1990)); Day Detectives, Inc. v. Savell, 291 So. 2d 716, 721 (Miss. 1974); Wells-Lamont Corp. v. Watkins, 151 So. 2d 600, 604 (Miss. 1963)).

[17] MISS. CODE ANN. § 71-3-17(c)(25) (1972); *see* Cox v. International Harvester Co., 221 So. 2d at 924, 926 (Miss. 1969) (observed that section 71-3-27(c)(25) allowed reconsideration of degree of impairment by Commission on its own motion or application of any party in interest).

[18] MISS. CODE ANN. § 71-3-37(8) (1972); *see Watkins*, 151 So. 2d at 603 (relying on section 71-3-37 for principle that Commission must properly protect rights of parties).

[19] MISS. CODE ANN. § 71-3-47 (1972).

[20] MISS. CODE ANN. § 71-3-55 (1972); *see* Scott Builders, Inc. v. Layton, 145 So. 2d 165, 167 (Miss. 1962) (relying on section 71-3-55 for principle that Commission should make such investigations and conduct such hearings to best ascer-

II. FULL DEVELOPMENT OF THE RECORD BEFORE THE FINAL JUDGMENT

As noted in *Freeman*, section 71-3-53's power is proper only after final judgment,[22] but defining final judgment is itself an arcane enterprise. Generally, it refers to the point at which the Commission renders a decision after a thorough investigation and full development of all facts relevant to an issue. Thus, the pre-decision or hearing phase of the adjudication takes place before final judgment.

A. Final Judgment v. Final Decision

However, a "final judgment" must be distinguished from a "final decision." A final decision may not infer that there has been a decision on the totality of the claim. There are many decisions which are "final" because they decide one or more issues, yet contemplate further hearings and decisions. Two examples are decisions which affirm portions of an administrative judge's order but remand the case for further evidence,[23] and decisions finding that the worker has not reached maximum medical cure.[24] In the second example, the Commission awards temporary disability benefits and orders continuing medical care.[25] In both situations it is contemplated that there

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tain rights of parties).

[21] *See Cox*, 221 So. 2d at 926 (acknowledging that compensation is subject to reconsideration on degree of impairment).

[22] *Freeman*, 590 So. 2d at 128.

[23] *See* Bickham v. Department of Mental Health, 592 So. 2d 96, 97 (Miss. 1991) (court remanded to determine whether there had been change in claimant's condition authorizing reopening).

[24] Bennett v. United Parcel Serv., 382 So. 2d 469, 472 (Miss. 1980).

[25] *Id.*

will be further development of the issues, including the right of the parties to add new issues relevant to the inquiry,[26] and to develop further other issues which may have already been decided.[27] Consequently, when a controversy arises concerning the application of section 71-3-53, the outcome may ultimately depend on the court's classification of "final judgment."

B. Discretionary Obligations of the Commission Prior to Final Judgment

The remedies afforded by the MWCA mandate the need for latitude in the Commission's fact-finding endeavors. The Commission is charged with the administration of an industrial injury benefits system from the time of the accident to the eventual return of the injured worker to society in the best possible state of health and productivity. The constant fluctuations in the physical impairment-wage loss cycles require that the Commission have, and exercise, a grant of authority commensurate with its continuing responsibility to monitor claims and to afford such immediate redress as the parties may demand in time of controversy. Within this territory, daily questions daily arise dealing with medical care, medical necessity and cost, temporary impairment, medical recovery, and degree of disability. Any of these questions may erupt into a dispute requiring Commission intervention in its fact-finding capacity, necessitating evidentiary presentations and formal adjudications by the Commission. Commission oversight should not be presumed to end until that ultimate objective is achieved.

Accomplishment of this objective must account for the relationship between the administrative judge and the Commission. The Commission is the ultimate finder of fact, and its responsibility extends to proceedings prior to final decision.[28]

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[26] *See* Graham v. City of Kosciusko, 339 So. 2d 60, 65 (Miss. 1976) (court remanded so claimant could file amended petition to put in issue of payment for nursing services).

[27] *See* American Potash & Chem. Corp. v. Rea, 228 So. 2d 867, 869 (Miss. 1969) (court remanded for proof on question of extent of claimant's loss of earning capacity).

[28] Day-Brite Lighting Div., Emerson Elec. v. Cummings, 419 So. 2d 211, 212-13 (Miss. 1982).

In these proceedings an administrative judge represents the Commission and makes initial fact findings based on the same evidence which the Commission's ultimate findings will be predicated. The fact-finding decisions of an administrative judge may well become the final decision of the Commission if not appealed within the period allowed by statute.[29] If the Commission hears an appeal and remands the matter to the administrative judge, all issues raised in the initial appeal of the decision remain issues pending the Commission's ultimate disposition.[30] Any decision by the Commission may be based solely on evidence gathered by the administrative judge or the Commission may gather additional evidence.

The Commission, alone or through the administrative judge, exercises broad discretion when gathering evidence. This is to ensure that relevant facts are developed and considered prior to rendering a decision. The court in *Freeman* considered this discretion an "obligation," in accord with the agency's fundamental procedural due process safeguards in its fact finding capacity.[31] The principle concern in procedural due process is

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[29] MISS. CODE ANN. § 71-3-47 (1972); *see* Marlboro Shirt Co. v. Whittington, 195 So. 2d 920, 921 (Miss. 1967).

[30] *Day-Brite Lighting*, 419 So. 2d at 212.

[31] A representative sampling of decisions involving abuse of discretion provides no reliable guide for determining the presence or absence of abuse in granting or denying the reopening of a record prior to final judgment:

Abuse of discretion in allowing reopening: See, e.g., Freeman, 590 So. 2d at 128-29 (misleading unfairly and depriving employer of right to present evidence); Aetna Casualty & Sur. v. Espinosa, 469 So. 2d 64, 67-68 (Miss. 1985) (ruling injury not arising out of employment and offering no evidence on subsequent motion to reopen under § 71-3-53); Consumer Discount Store v. Warner, 221 So. 2d 112, 113 (Miss. 1969) (awarding permanent disability benefits from court's previous record that permanent disability not established).

Abuse of discretion for rejecting reopening: *See, e.g.*, Staples v. Blue Cross & Blue Shield, 585 So. 2d 747, 749 (Miss. 1991) (dismissing motion to reopen without opportunity to be heard); *Freeman*, 590 So. 2d at 124 (refusing to allow employer to present evidence relevant to ultimate issue when misled as to nature of proceeding); Smith v. Container Gen., 559 So. 2d 1019, 1024 (Miss. 1990) (refusing reopening of record to introduce evidence not submitted at scheduled hearing); Bailey Lumber v. Mason, 401 So. 2d 696, 707 (Miss. 1981) (refusing to reopen over evidence showing previous 9(i) settlement not in best interest of client); Day Detectives v. Savell, 291 So. 2d 716, 721 (Miss. 1974) (refusing to reopen after rendering decision without previously scheduled hearing); Marshall v. Oliver Elec., 235 So. 2d 244, 247 (Miss. 1970) (refusing to reopen for cross-examination of witfairness. Although the extent of procedural due process provided varies according to the sophistication of the agency fact-finding machinery,[32] the litigants are at a minimum entitled to certain rights in connection with the hearing. These include a timely and meaningful notice of the time, place, and purpose of the proceeding, with a succinct statement of the issues to be addressed; a right to be present at such a hearing, with an attorney, if desired, to confront and cross-examine adversaries and witnesses, and present evidence; a fair and impartial hearing officer; and a written decision, based solely upon the evidence contained in the record produced at the hearing.[33] The

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ness with undisclosed information); American Potash & Chem. v. Rea, 228 So. 2d 867, 868-69 (Miss. 1969) (refusing to grant reopening for additional evidence of employment); Wells-Lamont Corp. v. Watkins, 151 So. 2d 600, 604 (Miss. 1963) (refusing reopening to admit deposition of medical witness not called during hearing); Scott Builders v. Layton, 145 So. 2d 165, 167 (Miss. 1962) (dismissing claim after claimant's evidence but before employer's evidence).

No abuse of discretion in refusing to reopen: See, e.g., Davis v. Scotch Plywood Co., 505 So. 2d 1192, 1198 (Miss. 1987) (evidence sought to be introduced only bolstering evidence in record); North Miss. Medical Ctr. v. Henton, 317 So. 2d 373, 376 (Miss. 1975) (denying reopening for lack of supporting evidence); Fowler Hereford Farm v. Madden, 207 So. 2d 622, 624 (Miss. 1968) (denying reopening for seeking to introduce unspecific evidence); Crump v. Fields, 171 So. 2d 857, 859 (Miss. 1965) (denying reopening to pursue entirely new theory without supportive evidence in record); Dixon v. Green, 127 So. 2d 662, 664 (Miss. 1961) (refusing reopening of 9(i) settlement without evidence of unfair advantage); Barq's Bottling Co. v. Broussard, 124 So. 2d 294, 297 (Miss. 1960) (refusing reopening of claim dismissed for attorney failure to appear at scheduled hearing); Druey v. Ingall's Shipbuilding, 114 So. 2d 772, 774 (Miss. 1959) (refusing to reopen after failure to submit medical depositions at hearing for that purpose); Estate of West v. Southern Bell Tel. & Tel., 90 So. 2d 1, 2-3 (Miss. 1956) (refusing reopening for admission of evidence with no bearing on ultimate issue)

No abuse of discretion for allowing reopening: See, e.g., Metal Trims Indus. v. Stovall, 562 So. 2d 1293, 1297 (Miss. 1990) (reopening for mistaken determination at prior hearing resulting in 9(i) settlement); Bennett v. United Parcel Serv., 382 So. 2d 469, 472 (Miss. 1980) (reopening after claimant reached maximum recovery and awarding benefits on same record); Lawrin v. Frazier, 213 So. 2d 548, 550 (Miss. 1968) (reopening approval of 9(i) settlement to give claimant additional medical treatment); Armstrong Tire & Rubber Co. v. Franks, 137 So. 2d 141, 144 (Miss. 1962) (allowing reopening for mistake in determination of fact); Roling v. Hatten & Davis Lumber Co., 85 So. 2d 486, 490 (Miss. 1956) (reopening on employer's request for reconsideration resulting in higher award).

[32] Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

[33] Goldberg v. Kelly, 397 U.S. 254, 270 (1970). However, these principles are breached with embarrassing frequency in our case law; *see* Monroe v. Broadwater

hearing process must therefore balance the competing principles of efficiency, in obtaining a result, and sufficiency of the inquiry, as a basis for that result. Accordingly, the Commission is given the discretion to admit or reject evidence and to conduct hearings which encourage thorough investigation of all facts relevant to the inquiry.[34]

Usage of these discretionary powers places a great strain on the Commission's adjudicatory obligations. On one hand, the MWCA contemplates a speedy determination of claims,[35] intending that litigated cases should be disposed of in one hearing. Accordingly, the court has encouraged the development of pleadings, with liberal allowance for amendment, and procedures committed to that end.[36] The informal hearing process mandated by the MWCA is designed to accomplish this result.[37] On the other hand, the Commission is obligated to extend the record to allow evidence, even if negligently or inadvertently omitted, critical to the ultimate issues.[38] This applies

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Beach Hotel, 593 So. 2d 26, 31 (Miss. 1992); Douglas & Lomason Co. v. Freeman, 590 So. 2d 124, 129 (Miss. 1991); Staples v. Blue Cross & Blue Shield, 585 So. 2d 747, 749 (Miss. 1991); Smith v. Container Gen. Corp., 559 So. 2d 1019, 1024 (Miss. 1990); Day Detectives v. Savell, 291 So. 2d 716, 721 (Miss. 1974); Marshall v. Oliver Elec., 235 So. 2d 244, 246 (Miss. 1970); Wells-Lamont Corp. v. Watkins, 151 So. 2d 600, 604 (Miss. 1963).

[34] *See* MISS. CODE ANN. § 71-3-55 (1972) (supporting full hearing concept); Scott Builders v. Layton, 145 So. 2d 165, 167 (Miss. 1962) (court relied on statute that Commission is authorized to make such investigations and conduct such hearings to best ascertain rights parties and said that statute presupposes full hearing on merits, not dismissal on the pleadings and claimant's evidence) (on such motion all reasonable inferences deducible from evidence must be resolved in claimant's favor and dismissal will lie only where claimant clearly fails to establish entitlement to benefits); *see also* MISS. CODE ANN. § 71-3-37 (1972); MISS. CODE ANN. § 71-3-47 (1972).

[35] Barq's Bottling Co. v. Broussard, 124 So. 2d 294, 297 (Miss. 1960). "Reasonable rules to effect that end are necessary." *Id.*

[36] Crump v. Fields, 171 So. 2d 857, 859 (Miss. 1965) "Litigated controversies should be disposed of on one hearing instead of piecemeal. The pleadings should be shaped toward that end . . . with . . . Amendments liberally allowed so that truth may be ascertained." *Id.*

[37] Day Detectives, Inc. v. Savell, 291 So. 2d 716, 720-21 (Miss. 1974).

[38] Marshall v. Oliver Elec. Mfg. Co., 235 So. 2d 244, 246-47 (Miss. 1970); "The right to reopen proceedings for the purpose of introducing testimony inadvertently omitted has been liberally allowed, even in criminal trials on formal hearing . . . this (refusal to allow additional testimony) takes the case out of the realm of

equally to evidence which was known to the parties at the time of the hearing and evidence discovered after the hearing but before the decision.[39] For these reasons, dismissal of a claim based on the claimant's evidence is not contemplated by the MWCA, unless the claimant clearly failed to show any entitlement to the benefits.[40] Also, due to the continuing jurisdiction of the Commission, claims should never be dismissed with prejudice.[41]

The Commission's rule-making authority is moderated by the statute's explicit disavowal of formal rules of evidence and procedure, allowing the Commission to formulate procedural rules designed to accomplish the unique objections of the MWCA.[42] The intent was to create a hearing mechanism

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discretion and places it in the realm of suppression of evidence." *Id.*; *see* Wells-Lamont Corp. v. Watkins, 151 So. 2d 600, 602 (Miss. 1963) (requiring reopening of record to receive wage loss testimony claimant neglected to introduce).

[39] American Potash & Chem. Corp. v. Rea, 228 So. 2d 867, 868-69 (Miss. 1969). The party moved to correct the record or, in the alternative, to reopen the case to present evidence that the claimant was gainfully employed in a period during which the referee found that he was disabled. *Id.*; *see Smith*, 559 So. 2d at 1023.

[40] Scott Builders v. Layton, 145 So. 2d 165, 167 (Miss. 1962).

[41] R.C. Petroleum, Inc. v. Hernandez, 555 So. 2d 1017, 1024 (Miss. 1990). The claimant should be given the opportunity to present additional evidence to the Commission in support of his claim. *Id.*

[42] *The Mississippi Administrative Procedures Act.* MISS. CODE ANN. § 25-43-5 (1972). This act establishes minimum rule-making procedures for state agencies, and states:

> (1) In addition to other rule-making authority and requirements imposed by law, each shall . . . (b) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available . . . . . (2) No agency rule, order or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual notice thereof.

Id.; MISS. CODE ANN. § 25-43-7 (1972):

> (1) Prior to . . . adoption . . . the agency shall give at least thirty (30) days notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the manner in which interested persons may present their views thereon. The notice shall be filed in the office of the secretary of state and mailed by the agency to all persons who have made timely request of the agency for advance notice of its

which allows full development of the issues in an efficient expeditious manner.[43] The importance of effective rules governing the hearing process was evident in recent cases. The absence, inadequacy, and/or disregard of procedural rules proved pivotal in these decisions of the court.[44]

The Commission has adopted rules governing its adjudicatory hearing process,[45] and recently implemented "policies"

> rule-making proceedings . . . . (3) No rule hereafter adopted is valid unless adopted in substantial compliance with this section. A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this section must be commenced within one (1) year from the effective date of the rule.

Id.; MISS. CODE ANN. § 25-43-15 (1972): "Specific statutory provisions governing agency procedures in contested cases which are in direct conflict with any of the provisions of this chapter shall continue to be applied to all proceedings of any such agency to the extent of such conflict only." *Id.*

Rule-making authority granted to the Workers' Compensation Commission. MISS. CODE ANN. § 71-3-47 (1972): "Except as otherwise provided by this chapter, the details of practice and procedure in the settlement and adjudication of claims shall be determined by rules of the commission, the text of which shall be published and be readily available to the parties." *Id.*; MISS. CODE ANN. § 71-3-55(1) (1972): "In making an investigation or inquiry or conducting a hearing, the commission shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter . . . ." *Id.* MISS. CODE ANN. § 71-3-85(5) (1972):

> The commission shall adopt detailed rules and regulations for implementing the purposes of this chapter at hearings attended by the main parties interested. Such rules, upon adoption, shall be published and be at all reasonable times made available to the public and, if not inconsistent with the law, shall be binding upon those participating in the responsibilities and benefits of the Worker' Compensation Law.

Id.

[43] MISS. CODE ANN. § 71-3-55(1) (1972).

[44] *See* Monroe v. Broadwater Beach Hotel, 593 So. 2d 26, 31 (Miss. 1992) (held judge erred in denial of General Rule 9 motion); Douglas & Lomason Co. v. Freeman, 540 So. 2d 124, 128-29 (Miss. 1991) (held Commission abused discretion in denial of reopening to allow rebuttal testimony); Staples v. Blue Cross & Blue Shield, Inc., 585 So. 2d 747, 749 (Miss. 1991) (Commission abused discretion in failing to consider proper statutory requisites).

[45] Mississippi Workers' Compensation Commission Procedural Rule 6 provides:

> NOTICE OF HEARING. In the event a proper disposition of the cause is not made and any party desires a hearing in the matter, the Commission will give notice of this hearing at least twenty (20) days prior to the date on which the matter is to be heard; said notice shall contain the names of the parties, the place and time of the hearing. The hearing will be

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> limited solely to the issues reflected by the pleadings.
>
> This Rule shall be in force and effect on and after July 1, 1992.

Id.; Mississippi Workers' Compensation Commission Procedural Rule 7 provides:

> HEARINGS. All cases to be heard before the Commission, whether an evidentiary hearing before an Administrative Judge or a review hearing before the Full Commission, shall be docketed with the Commission at least twenty-three (23) days before the date set for hearing, except those cases requiring less time or notice of hearing by statute or rule, including, but not limited to, Section 71-3-17(b) and General Rule 9, or by agreement of all parties. Each such case docketed shall be given a number and all parties advised of the date of hearing.
>
> All discovery shall be conducted as required by the Mississippi Rules of Civil Procedure except as amended by the rules of the Commission and completed within sixty (60) days from the day the Answer (B-5,22) is due to be filed. Discovery may be extended on good cause shown by written order of an Administrative Judge or Commissioner before the case is set for hearing. Discovery may be waived or time shortened by agreement. All depositions taken to be introduced in lieu of live testimony shall be completed no less than five (5) days before the hearing unless good cause is shown and an order extending such time for completion of such depositions is entered by the Administrative Judge or a Commissioner.
>
> All cases shall be completed at one hearing on the merits and all evidence, lay, expert and documentary shall be introduced at such hearing. No case set for hearing on the merits shall be continued except in event of illness of an interested party or other extreme circumstances. All motions for continuances shall be in writing and shall state with particularity the grounds therefor as required by the Mississippi Rules of Civil Procedure. An Administrative Judge or a Commissioner may grant such continuance by written order.
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> All medical evidence shall either be received at the evidentiary hearing or the depositions thereof shall be filed with the Commission prior to or on the day of the hearing. In extreme circumstances the time for taking filing medical evidence may be extended thirty (30) days after the initial hearing, provided the parties have complied with Procedural Rule 9 thereafter only under extreme circumstances and on written motion with supporting evidence will an additional thirty (30) day period be granted. Afterwards the record shall be closed and the case shall be placed in line for a final order. It is the intention of this rule to restrict such extensions to special exceptions and not to liberally allow such extensions.
>
> Should a party fail to appear at a scheduled hearing, the Administrative Judge on his own motion, or on a motion of an appearing party, may dismiss the case or award compensation upon presentation of proper proof. In either case, a request for review by the absent party will not be granted. If, however, a justifiable reason is presented within fourteen (14) days after the date of the order dismissing or awarding compensation, a motion to reopen or set aside the order of dismissal may be heard in the Commission's discretion. In the event neither party appears at a hearing, the case will be dismissed on motion of an Administrative Judge, the

which will hopefully provide uniform application of the rules and will expedite hearings. Such rules and policies are only as effective as their uniform application will permit; this, in turn, is governed by the subject-matter of the MWCA and the mandate to fully develop the issues. Procedural rules are due process signposts; lacking these, the neighborhood is dark, and evidentiary proceedings have been likened to a knife fight in a dark alley. The lack of procedural rules to address specific situations leaves litigants without direction and burdens the courts with the necessity of providing that direction.

The circumstances in the recent case of *Monroe v. Broadwater Beach Hotel*[46] underscore the significance of adequate notification of the time, place, and purpose of an evidentiary proceeding. The Commission's "Official Notice of Hearing" serves primarily as the notice of time and place of the hearing; however, it is doubtful whether this notices meets its obligation to provide meaningful notification to the parties regarding the nature of the proceeding to be conducted.

Accordingly, the proper exercise of discretion before final judgment contemplates due process notification of the time, place and purpose of a hearing; an opportunity to be fully heard; and a decision on the record. Moreover, discretion at this level assumes a very broad interpretation in favor of the

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> Commission or a Commission representative and the order will become final unless proper motion to reopen is filed within fourteen (14) days as aforesaid.
>
> All cases not set for hearing shall be reviewed periodically. Failure of the party or the party's attorney to respond to a status inquiry within twenty (20) days may result in the dismissal of the claim, award of benefits or other sanctions.
>
> This Rule shall be in force and effect on and after August 6, 1984.

Id.; Mississippi Workers' Compensation Commission Procedural Rule 9 provides:

> INTRODUCTION OF EVIDENCE AND DISCOVERY. A motion for the introduction of additional evidence must be made in writing at least five (5) days prior to the date of the hearing of the review by the Full Commission. Such motion shall state with particularity the nature of such evidence, the necessity therefor and the reason it was not introduced at the evidentiary hearing. If additional evidence is admitted, it shall be stenographically reported or recorded and become a part of the record.

Id.

[46] 593 So. 2d 276 (Miss. 1992).

collection and assimilation of all trustworthy information relevant to the inquiry. This ensures that the Commission's decision is an informed one. At the same time, "discretion" need not obscure the process with irrelevancy. Thus, it is not an abuse of discretion to eschew reopening the record for evidence not bearing upon the ultimate issues.[47] In the final analysis, the Commission's legitimate exercise of its reopening discretion prior to rendering a decision would be well served by procedural rules designed to avoid the pitfalls encountered recent cases.

III. SECTION 71-3-53'S REOPENING AUTHORIZATION

Procedural due process and the Commission's obligation to fully develop the record on all issues apply equally to considerations of motions to reopen under section 71-3-53. Such motions cannot be dismissed without granting the movant an opportunity to be heard.[48] For example, the procedural due process issues which the court was compelled to address in *Freeman* and *Staples v. Blue Cross & Blue Shield, Inc.*[49] arose because there were no procedural rules governing the hearing process upon invocation of section 71-3-53. Historically, the Commission's response to the section 71-3-53 motion was to schedule a full evidentiary hearing on the merits of the motion, rather than a "motion hearing" as was common practice in other forums. At the conclusion of the evidentiary hearing, the officer conducting the hearing either amended the previous Commission decision or denied the motion. This practice was supported by the desire to avoid duplicity and unnecessary delay. Because both the Commission and the parties were fully aware of the procedure, it was workable. However, in *Freeman*, the party was not aware of the practice and was deprived of a fair hearing, which clearly illustrated the need for procedural certainty.[50]

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[47] *See, e.g.*, Estate of West v. Southern Bell Tel. & Tel., 90 So. 2d 1, 3 (Miss. 1956) (reopening sought in order to submit evidence of insanity); Davis v. Scotch Plywood Co., 505 So. 2d 1192, 1198 (Miss. 1987) (reopening sought to bolster evidence already in the record).

[48] Staples v. Blue Cross & Blue Shield, Inc., 585 So. 2d 747, 748-49 (Miss. 1991).

[49] 585 So. 2d 747 (Miss. 1991).

Accordingly, section 71-3-53 provides the Commission a "limited access" to review and revise its prior decisions. This discretion is a necessary power, given the subject-matter of the Commission's jurisdiction. Employment conditions, economic circumstances, physical conditions and the need for medical treatment are constantly changing for better or worse. Accordingly, the Commission, to accommodate these changes and to protect against error in its resolution of claims, must have some means of ratification in the interest of justice.

Aside from the aspects of reopening presented in *Freeman* and other authority authorizing continuing oversight of the Commission in contested claims, section 71-3-53 is generally recognized as the primary reopening authority. By its terms, section 71-3-53 may be invoked "at any time prior to one year" after the last payment of compensation or rejection of a claim, which is understood to be virtually any time after an accidental injury. Because multiple devices induce the Commission to reconsider or receive additional evidence during the its adjudicatory phase, the limited recourse of section 71-3-53 is the most important in cases of claims which have to all intents been concluded.[51] However, the court in *Freeman* recognized a distinction between the right to reopen under section 71-3-53, which is restrictive on its face, and reopening under other authority, since there must be evidence of (1) "a change in conditions," or (2) "a mistake in determination of fact" before reopening is proper under section 71-3-53.[52] A change in conditions requires some comparative evidence of change, without which reopening will not be allowed.[53] Mistake in the determination of fact infers some evidence of prior Commission fact-finding error.[54] The court in *Freeman* referred to language in an earlier case,[55] which stated that a claimant could petition the Commission under section 71-3-53 "within one year from the date this judgment becomes final for the purpose of putting on proof . . . of loss of wage-earning capacity."[56] The *Freeman* court stated that this language "[s]hould not be relied upon by the bench and bar for the proposition that any claimant may petition to reopen within one year, because it fails to point out that there must be a change in conditions, or a mistake in a determination of fact."[57]

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[50] *Freeman*, 590 So. 2d at 127-29.

[51] MISS. CODE ANN. § 71-3-53 (1972); *see, e.g.*, Cox v. International Harvester Co., 221 So. 2d 924, 926 (Miss. 1969) (affirming Commission finding of no permanent disability in whole body injury, court observed that § 71-3-17(c)(25) allowed reconsideration of degree of impairment by Commission on its own motion or application of any party in interest); Wells-Lamont Corp. v. Watkins, 151 So. 2d 600, 602-04 (Miss. 1963) (relying on § 71-3-37 for principle that Commission must properly protect rights of parties); Scott Builders v. Layton, 145 So. 2d 165, 167 (Miss. 1962) (relying on § 71-3-5 for principle that Commission should make such investigations and conduct such hearings to best ascertain rights of parties).

[52] *Freeman*, 590 So. 2d at 127. Thus, whether a claim can be saved from the one-year limitation by alleging a recurrence of the injury (as opposed to the occurrence of a new injury) with payment of benefits within the statutory one year,

A. Change in Conditions

Many practitioners are unsure of the proper application of reopening under section 71-3-53 because the court has yet to precisely define the scope of "change in conditions" or "mistake in determination of fact." The main sources of concern in section 71-3-53 reopening seem to be economic changes and workers' ability to obtain and maintain employment. Although unnecessary to the result in either case result, the court has noted that these two grounds for reopening were disjunctive and must refer to differing circumstances, so that "change of condition" must mean a change in physical condition;[58] and recently, the court clearly inferred that "change in conditions" does not refer simply to a change in the claimant's economic circumstances.[59] Further, the court approved a Florida interpretation of a "substantially similar" reopening statute, which stated "unequivocally, that a subsequent adequate job search,

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is a question of fact for the Commission to decide. *Id.*; *see* Yazoo Mfg. Co. v. Schaffer, 179 So. 2d 784, 787-91 (Miss. 1965).

[53] North Miss. Medical Ctr. v. Henton, 317 So. 2d 373, 375-76 (Miss. 1975).

[54] Bennett v. United Parcel Serv., 382 So. 2d 469, 472-74 (Miss. 1980).

[55] Sardis Luggage Co. v. Wilson, 474 So. 2d 826, 829 (Miss. 1979).

[56] *Freeman*, 390 So. 2d at 127.

[57] *Id.*

[58] Aetna Casualty & Sur. v. Espinosa, 469 So. 2d 64, 66 (Miss. 1985).

[59] *Freeman*, 590 So. 2d at 127-28.

standing alone, was insufficient grounds for modification based on a change in circumstances."[60] The court has elsewhere stated that there must be evidence of an actual change in physical condition or evidence that a refusal of employment was due to the worker's work-related disability.[61]

In a recent case, the claimant alleged in a reopening motion that a change in the ability of the parties to determine post injury wages, due to the death of the claimant's employer, was a sufficient "change in condition."[62] The employer-movant argued that the value of the deceased employer's estate, which had been promised to claimant, should be considered in determining the claimant's wage earning capacity.[63] However, the court found no new evidence to show that claimant could perform the physical requirements of a home health care aid nor evidence contradicting the original finding that the claimant could not perform physical activity. The opinion contained no comment on the presence of evidence of the value of the estate as indicative of a "change in conditions."[64]

An argument may be made for a broad construction of "change in conditions," notwithstanding the restrictive tenor of the decisions. The term employed in section 71-3-53 is "change in conditions" while the Florida statute, alluded to by the court in *Freeman*, uses the phrase "change in condition."[65] It is immediately apparent that the Florida statute is in the singular, and the Mississippi statute is in the plural. Further, the Longshoreman and Harbor Workers' Compensation Act (LHWCA),[66] relied upon by the court in *Staples*, in its quest for an acceptable definition, mirrors the MWCA, requiring "a change in conditions." At least one federal court has upheld reopening under the LHWCA for a change in conditions where the parties stipulated there had been no change in physical condition and the only evidence was a change in economic conditions.[67]

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[60] *Id.*

[61] North Miss. Medical Ctr. v. Henton, 317 So. 2d 373, 375-76 (Miss. 1975).

[62] Ray v. Miss. State Bd. of Health, 598 So. 2d 760, 762 (Miss. 1992).

[63] *Id.*

[64] *Id.* at 765.

[65] *Freeman*, 590 So. 2d at 128 (quoting Flexche v. Interstate Warehouse, 411 So. 2d 919 (Fla. 1982)).

[66] 33 U.S.C. § 922 (1988).

B. Mistake in Determination of Fact

In what is apparently the first published case on section 71-3-53 reopening, the court quickly recognized the grant of authority to review and retroactively revise a prior decision on the basis of a mistake in determination of fact, in derogation of any notion of res judicata.[68] Since permanent disability benefits were being paid pursuant to an award, the reconsideration could have been sought under section 71-3-17(c)(25), except this section does not expressly provide for a retroactive revision of a prior award. Reopening for mistake of fact has been routinely allowed in the case of lump sum settlements[69] and to correct errors inherent in the record or disclosed by new evidence.[70]

The utility of reopening for mistake in determination of fact appears to have been broadened in *Staples*.[71] The court stated that Mississippi law seems to be in line with the liberal interpretation of "mistake in the determination of fact," reading the language as vesting broad agency discretion to correct errors of fact "[w]hether demonstrated by wholly new evidence on the, cumulative evidence, or merely further reflection on the evidence initially submitted."[72]

The Mississippi Supreme Court in *Staples* reversed and rendered on the original record without additional evidence on the Commission's finding concerning the date of injury, stating that the Commission's mistake was obvious. A reading of the federal case cited by the court in *Staples* indicates that Congress intended the amendment to extend the time limitation for review of a determination of fact without limitation as to any particular factual error.[73] Case law contains many instances in which a party has been unintentionally misled or has labored under a mistake of fact. It is clear, however, that the only basis for reopening under section 71-3-53 for a mistake of fact is a Commission mistake in a prior factual determination.[74]

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[67] Fleetwood v. Newport News Shipbuilding & Dry Dock, 776 F.2d 1225, 1228 (1985).

[68] Hill v. United Timber & Lumber Co., 73 So. 2d 247, 248 (Miss. 1954), the Court, on a writ of *coram nobis* filed while the case was pending on petition for review, remanded the case to the Commission "in the interest of justice" to receive newly discovered evidence of the existence of a prior marriage, which, if correct, would deprive the alleged surviving spouse of her right to death benefits. *Id.* The court noted that the Commission did not then have jurisdiction of the case, but that the facts " . . . do not render that section inapplicable." *Id.*; *see* Roling v. Hatten & Davis Lumber Co., 85 So. 2d 486, 490 (Miss. 1956).

[69] MISS. CODE ANN. § 71-3-37(10) (Supp. 1992).

[70] Bennett v. United Parcel Service, 382 So. 2d 469, 472 (Miss. 1980); American Potash & Chemical Corp. v. Rea, 228 So. 2d 867, 868-69 (Miss. 1969); Pryor v. Woodall Industries, Inc., 167 So. 2d 920, 922 (Miss. 1964).

[71] *Staples*, 585 So. 2d at 749.

[72] *Id.* (quoting O'Keeffe v. Aerojet-General Shipyards, 404 U.S. 254, 256 (1971)).

C. *Res Judicata: The Law of the Case*

Res judicata, "the law of the case," has an acknowledged application in workers' compensation, but it is circumscribed by the reconsideration authority granted to the Commission by the MWCA, particularly section 71-3-53.[75] This principle is of particular concern to practitioners because of the stern court warning that reopening is not to be used as a "substitute for an appeal."[76] Where appeal and reopening are alternative options, most parties file both a notice of appeal and an alternative motion to reopen.[77] Even if only the motion to reopen is filed, the original appeal period will not run until disposition of the motion.[78]

A decision of the Commission or the court becomes "the law of the case" when the one year limitation of section 71-3-53 has expired. Otherwise, decisions of the Commission, even if ratified by the courts, are subject to review and reconsideration, at least under section 71-3-53. Cases have held that a prior decision was "the law of the case," but the motions to reopen failed in those cases only because the evidence presented was insufficient to justify reopening. Thus, the decision of the court rejecting the compensability of a claim was the "law of the case" and a subsequent motion to reopen for a change in condition failed because there was no evidence presented on the issue of compensability.[79] The court's prior ruling that there was insufficient evidence to establish permanent disability was "the law of the case" when the issue of permanent disability was submitted on the same record.[80] The principle has been applied as a bar to relief, however, in a case involving a claim for death benefits, where one claimant alleged that a worker had died as the result of a condition which the Commission, in a prior claim for disability benefits, had held did not arise out of and in the course of employment.[81]

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[73] *O'Keeffe*, 404 U.S. at 255-56.

[74] Bailey Lumber Co. v. Mason, 401 So. 2d 696, 707 (Miss. 1981); *see* Armstrong Tire & Rubber Co. v. Franks, 137 So.2d 141, 144 (Miss. 1962); *Bennett* 382 So. 2d at 472.

[75] *See Roling*, 85 So.2d at 490.

[76] *Aetna Casualty & Sur.*, 469 So. 2d at 68 (citing *Henton*, 317 So. 2d at 376).

[77] Johnston v. Hattiesburg Clinic, 423 So. 2d 114, 115 (Miss. 1982).

[78] *Id.*

D. Reconsideration of Settlements

In the earliest reported attempt to reopen a 9(i) settlement,[82] the court affirmed the Commission's refusal to allow the reopening, holding that the Commission did not abuse its discretion because there was no showing of fraud or "unfair advantage."[83] Many took this case to hold that a settlement could only be reopened for actions tantamount to fraud. *Bailey Lumber Co. v. Mason*,[84] furthered this misconception, detailing facts from which unfair advantage tantamount to fraud could be implied.[85] However, the language of section 71-3-53 does not limit the scope of reopening. *Metal Trims Industries, Inc. v. Stovall*,[86] coupled with a close reading of *Bailey Lumber* demonstrates that a court may reopen 9(i) settlements, at least for a mistake in determination of fact, by a showing mistake by the Commission in concluding, on the basis of erroneous evidence, that the settlement was in the claimant's best interest.[87]

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[79] *Aetna Casualty & Sur.*, 469 So. 2d at 66-67.

[80] Consumer Discount Store v. Warren, 221 So. 2d 112, 113 (Miss. 1969).

[81] Knox Glass v. Evans, 246 So. 2d 89, 90-91 (Miss. 1971).

[82] MISS. CODE ANN. § 71-3-29 (1972).

[83] Dixon v. Green, 127 So. 2d 662, 664 (Miss. 1961).

[84] 401 So. 2d 696 (Miss. 1981)

[85] *Bailey Lumber*, 401 So. 2d at 704.

[86] 562 So. 2d 1293 (Miss. 1990).

The dissenting opinion in a recent case is but another omen that a complete understanding of section 71-3-53 has not yet been achieved. In *Bickham v. Department of Mental Health*,[88] the issue was the right to an interlocutory appeal. After the court decided that such appeal was not available under workers' compensation law, Justice Robertson, dissenting, noted that *Spann* involved an issue of law which had not been resolved. Namely, whether a 9(i) settlement can be reopened for a change in conditions under 71-3-53.[89]

A 13(j) lump sum settlement[90] is merely an advancement or acceleration in the payment of disability benefits. Approval of such a payment is not a binding contract or a final settlement, or a 9(i) settlement, and is routinely reopened under section 71-3-53.[91] The "mistake of fact" here might be the medical condition of the worker.[92] However, the claimant's prior knowledge that surgery would improve his condition[93] or that his disability was probably greater than the amount for which payment of benefits was accelerated, is irrelevant.[94]

IV. CONCLUSION

Reopening is a valuable tool for workers' compensation practitioners, and there are several methods of invoking the Commission's review from which to choose. It is a great injustice that more attention is not given to the prospective use of reopening authority, particularly under section 71-3-17(c)(25) and section 71-3-53, as support for what the MWCA intends; the speedy adjudication of claims and payment of benefits. Reopening is viewed myopically and retrospectively as a method of review, instead of as a measure for reassessment in aid of the expeditious delivery of benefits.

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[87] *Id.* at 1297.

[88] 592 So.2d 96 (Miss. 1991).

[89] *Id.* at 103 (Robertson, J., dissenting). The dissent referred to Craig-Wilkerson, Inc. v. Spann, which was consolidated and discussed in *Bickham. Id.*

[90] MISS. CODE ANN. § 71-3-37(10) (Supp. 1992).

[91] *Armstrong Tire & Rubber Co.*, 137 So. 2d at 145-46.

[92] Lawrin Co. v. Frazier, 213 So. 2d 548, 550 (Miss. 1968).

[93] *Id.*

[94] *Armstrong Tire & Rubber Co.*, 137 So. 2d at 147.

Many questions remain unanswered on the breadth of reopening for change in conditions or mistake in determination of fact. Given the mandate for a liberal interpretation of the MWCA in favor of the payment of compensation, it is mystifying to see the Court "splitting hairs" to determine into which, if either, of these classes the fluctuating economic, employment, and physical conditions will fit. It is unimaginable that subsequent employment attempts are not a relevant inquiry and a legitimate basis for reopening under 71-3-53, and certainly, in a given circumstance, they could be counted as either a change in conditions or grounds for establishing a mistake in determination of fact. So, too, is a changing physical condition evidence of a prior factual estimate of impairment.[95] The simplest solution is to plead the two grounds in the alternative and let the evidence address both. But, there is still a lot of unneeded controversy, even in workers' compensation.

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[95] *Pryor*, 167 So. 2d at 922.

THE AMERICANS WITH DISABILITIES ACT OF 1990 AND WORKERS' COMPENSATION: THE EMPLOYEES' PERSPECTIVE

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I. INTRODUCTION

The employment provisions of the Americans with Disabilities Act of 1990 (ADA)[2] became effective on July 26, 1992, two years after the statute was enacted by Congress and signed by President Bush.[3] On July 26, 1991, the Equal Employment Opportunity Commission (EEOC), pursuant to the mandate of the ADA,[4] promulgated regulations and an Interpretive guideline appendix (guidelines) to assist in the implementation of the equal employment provisions of the Act.[5]

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[2] 42 U.S.C.A. §§ 12101-12213 (West Supp. 1992). Title I of the ADA deals specifically with employment. 42 U.S.C.A. §§ 12111-17 (West Supp. 1992). Provisions pertinent to employment issues are also found in a preliminary section dealing with findings, purposes and definitions. 42 U.S.C.A. §§ 12101-02 (West Supp. 1992). Title V of the Act, which codifies miscellaneous provisions applicable to all aspects of the ADA, also refers to employment issues. 42 U.S.C.A. §§ 12201-13 (West Supp. 1992). Hereinafter, unless otherwise specified, the term ADA or the Act will refer to the provisions of the Americans with Disabilities Act that affect employment.

[3] The legislative history of the ADA is largely contained in four congressional reports. *See* H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445 [hereinafter House Judiciary Report]; H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 565 [hereinafter Conference Report]; H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2 (1990) *reprinted in* 1990 U.S.C.C.A.N. 303 [hereinafter House Labor Report]; S. REP. NO. 116, 101st Cong., 1st Sess. (1989) [hereinafter Senate Report].

[4] 42 U.S.C.A. § 12116 (West Supp. 1992). Authority was given to the EEOC to issue regulations no later than one year after the enactment of the ADA. *Id.*

The ADA does not specifically regulate the behavior of any state workers' compensation commission, except the employment practices of such commission insofar as the commission is an employer within the meaning of the Act.[6] Furthermore, the ADA does not specifically make reference to state workers' compensation laws, except to provide that the ADA shall not "be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter."[7] Similarly, the EEOC regulations make no specific mention of workers' compensation laws.[8] This is to be expected, however, since the Act operates exclusively to regulate the behavior of "covered entities."[9] "Covered entities" as defined by the Act are public and private sector employers with twenty-five or more employees, until July 26, 1994, and fifteen or more employees thereafter.[10] Nevertheless, for several reasons, the ADA is, in fact, likely to affect the administration of state workers' compensation acts.

First, most employers covered by the ADA are also subject to state workers' compensation laws.[11] This simultaneous coverage may cause conflict since the workers' compensation laws impose obligations on employers to obtain and submit medical information, on injured employees and on some healthy employees, to the commission. However, the ADA substantially limits an employer's ability to obtain or share medical information on its employees.[12]

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[5] 29 C.F.R. § 1630 (1992). The EEOC has, also pursuant to statutory mandate, adopted procedural regulations for the processing of ADA claims. The regulations provide that ADA claims should be handled the same as claims of discrimination under Title VII of the Civil Rights Act of 1964. 29 C.F.R. § 1601 (1992); *see also* 42 U.S.C.A. §§ 2000e-16 (West Supp. 1992) (prohibiting discrimination on basis of race, color, religion, sex, or national origin).

[6] 42 U.S.C.A. § 12201(b) (West Supp. 1992).

[7] *Id.*

[8] 29 C.F.R. § 1630 (1992).

[9] 42 U.S.C.A. § 12111(2) (West Supp. 1992). The entities included in the ADA are employers, employment agencies, labor organizations and joint labor management committees. 42 U.S.C.A. § 12111(2) (West Supp. 1992). For purposes of considering the interaction between workers' compensation laws and the ADA, the only significant covered entities are employers and, to a much lesser extent, labor organizations. 42 U.S.C.A. § 12111(5), (7) (West Supp. 1992).

[10] 42 U.S.C.A. § 12111(5)(A) (West Supp. 1992).

[11] MISS. CODE ANN. §§ 71-3-1 to 71-3-181 (1972 & Supp. 1992) [hereinafter MWCA or Mississippi Act]. The Mississippi Workers' Compensation Act is both more and less inclusive than the ADA. The MWCA covers employers with five or

Second, some workers' compensation claimants are, or may become, persons with disabilities protected by the ADA. Employers and prospective employers owe a duty of non-discrimination to persons with disabilities.[13] This duty includes not only the obligation not to discriminate either intentionally or in effect,[14] but also an affirmative obligation to reasonably accommodate the applicant's or employee's disability.[15]

Third, employers in the private sector have long used risk management techniques *vis a vis* workers' compensation costs that have never before been considered improper, but are now clearly illegal under the ADA.[16] These techniques include taking extensive medical and compensation histories at the application stage and automatically excluding persons with certain medical histories from certain kinds of jobs.[17]

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more employees, thus including in its coverage employers not covered by the ADA. MISS. CODE ANN. § 71-3-5 (Supp. 1992). However, the Mississippi Act also excludes from coverage certain employers in the public sector that are within the ambit of the ADA. *Id.* Therefore, workers' compensation claimants working for employers with fewer than the ADA minimum number of employees may not have the benefit of many of the protections discussed here. *See* 42 U.S.C.A. §§ 12111(5)(A), (B) (West Supp. 1992) (discussing the parameters of "employer").

[12] 42 U.S.C.A. § 12112(d) (West Supp. 1992).

[13] 42 U.S.C.A. § 12112(a) (West Supp. 1992).

[14] 42 U.S.C.A. § 12112(b) (West Supp. 1992).

[15] 42 U.S.C.A. § 12112(b)(5)(A) (West Supp. 1992).

[16] 42 U.S.C.A. §§ 12112(a), (b), (d) (West Supp. 1992). *See* House Judiciary Report, *supra* note 3, at 42-43 (discussing medical histories at application stage). *See generally* VARDAMAN S. DUNN, WORKMEN'S COMPENSATION: A COMPREHENSIVE TREATISE ON THE WORKMEN'S COMPENSATION LAW OF MISSISSIPPI § 47-50 (3d ed. 1982) (commenting that presumptive exclusion from employment of anyone whose health, in estimation of employer, might pose threat of heightened workers' compensation liability was, before the ADA, a permissible risk management technique); ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 59.00-59.43 (Supp. 1992) (discussing employer's liability if he hires partially disabled person who later becomes totally disabled).

[17] 42 U.S.C.A. § 12112(a), (b), (d) (West Supp. 1992).

These practical realities, while not specifically articulated in the Act or the regulations, are acknowledged by the EEOC in its guidelines.[18] The guidelines make several direct references to how the ADA will regulate employer behavior in joint ADA/workers' compensation matters.[19]

In addition to the practical interfaces, arising because most workers' compensation employers are also covered by the ADA, the enactment of the ADA could have a direct effect on state law as well. Where employer's actions concerning workers compensation transgress the ADA workers are afforded an independent federal remedy against those employers. The courts in many states, including Mississippi, have declined to interpret state workers' compensation acts as prohibiting employers from firing or taking other adverse employment action against an injured employee solely because of his injuries or his filing of a compensation claim.[20] In doing so, the state courts have narrowly interpreted workers' compensation acts to require only the payment of compensation and medical expenses.[21] The courts that have set forth this interpretation have relied on the fact that there is no countervailing public policy that would justify abrogating an employer's wide latitude regarding employment decisions.[22] Based on the principles of employment-at-will, employers maintain wide discretion in determining the post-injury/post-compensation claim employment relationship, if any, between the employer and the workers' compensation claimant.[23] To the extent that the ADA expressly articulates a public policy that would jutify taking away an employer's wide latitude, it can be used by courts to re-interpret state workers' compensation laws to preclude adverse employment towards workers' cmpensation claimants, at least where the compensable injury results in a measure of permanent disability.[24] In *Kelly*, a pre-ADA Mississippi Supreme Court case, the court noted that some states already interpreted their compensation acts to prohibit discharge of compensation claimants, but held that the MWCA did not.[25] The public policy anounced in the ADA could, therefore, support a successful challenge to the *Kelly* decision.[26]

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[18] 29 C.F.R. app. § 1630 (1992).

[19] *See, e.g.*, 29 C.F.R. app. § 1630.2(l) (1992) (noting that employer concerns regarding increased workers' compensation costs are "myths, fears and stereotypes," resulting in individuals being regarded as having disability); 29 C.F.R. app. § 1630.13(a) (1992) (interpreting ADA to prohibit employers from making any inquiry at pre-offer stage about applicant's disability and/or workers' compensation history); 29 C.F.R. app. § 1630.14(b) (1992) (interpreting ADA not to pre-empt state workers' compensation acts, insofar as state law requires submission of information to state compensation officials or second injury funds, at least if purpose for such submission does not conflict with ADA); 29 C.F.R. app. § 1630.15(a) (1992) (excluding use of increased workers' compensation costs as legitimate nondiscriminatory reason justifying disparate treatment of individual with disability in defense of that individual's ADA claim).

[20] Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 875 (Miss. 1981) (citing case law in numerous other states, both pro and con).

[21] *Kelly*, 397 So. 2d at 876.

[22] *Id.* at 874-76.

The articulated purpose of the ADA, to ensure that persons with disabilities are not arbitrarily excluded from the work-force,[27] is fully complementary to the Mississippi Workers' Compensation Act's articulated purpose of restoring injured workers "to health and *vocational opportunities.*"[28] The ADA is also in keeping with the Mississippi Supreme Court's statement that "the singular purpose pervading the [Mississippi] Workers' Compensation Act is to promote the welfare of laborers within the state" and that "[a]s remedial legislation to compensate *and make whole*, . . . it should be construed fairly to further its humanitarian aims."[29]

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[23] *Id.* at 874-75.

[24] 29 C.F.R. § 12101(a)(8) (1992) (articulating public policy of desiring to ameliorate such discrimination, not only in interest of disabled worker, but also in interest of whole American economy). *See* 29 C.F.R. §§ 1201(a)(4), (6), (7) (1992) (acknowledging that persons with disabilities have not previously had any legal recourse to redress discriminatory treatment at hands of employers, although such individuals are often severely disadvantaged by such discrimination).

[25] *Kelly*, 397 So. 2d at 876.

[26] In *Kelly*, the Court expressly noted that many of the states which had construed their compensation acts to prohibit discharge of compensation claimants also had sanctions, independent of the compensation acts, against discharging workers' compensation claimants. *Kelly*, 397 So. 2d at 875, 875 n.1. Since Mississippi had no such law, the Court relied, at least in part, on this distinction to justify its own holding that the MWCA did not prohibit such discharges in Mississippi, even though the Court felt that the arguments in favor of such a prohibition had "considerable merit." *Id.* at 876. Instead, the Court preferred to leave it to the Legislature to address the subject, before the Court imposed such a requirement. *Id.* The Mississippi Supreme Court has, however, recently indicated that there are limits to its patience in waiting for the Legislature to remedy what the Court believes to be against public policy. Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288 (Miss. 1992). With the enactment of the ADA, advocates for employees will now have two strings to their bows in seeking reconsideration of *Kelly*. The Mississippi Legislature has declined to act during the last twelve years to redress this unfair practice, and there is now a federal policy against such practices as well.

[27] 29 C.F.R. § 1630.1(a) (1992).

Further, the ADA is entirely consistent with the Mississippi Supreme Court's recent holding that "[t]here is a broad public policy behind the [MWCA] to . . . restore the injured worker to health and productivity," and that "a sensitive nerve of the Fourteenth Amendment's equal protection of law clause is struck when any statute hinders a man or woman from earning a living at a task for which he or she is trained and educated."[30]

II. THE ADA'S AFFECT ON EMPLOYER/EMPLOYEE RELATIONSHIPS UNDER WORKER'S COMPENSATION

Beyond the brief discussion just concluded, this article will make no further attempt to predict how the Mississippi

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[28] MISS. CODE ANN.§ 71-3-1 (1972 & Supp. 1992) (emphasis added).

[29] Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 889 (Miss. 1980) (emphasis added) (citations omitted).

[30] White v. Hattiesburg Cable Co., 590 So. 2d 867, 870 (Miss. 1991). The Fourteenth Amendment comments refer to the ability of chiropractors to be paid by workers' compensation insurance for medical treatment accorded compensation claimants, not specifically to the right of compensation claimants to earn a living. *Id.* at 869-70. However, the Mississippi Supreme Court has employed the Equal Protection Clause to strike down provisions of the MWCA that it found discriminated against claimants based on gender. Wilson v. Service Broadcasters, Inc., 483 So. 2d 1339, 1343-44 (Miss. 1986). The Mississippi Court has also upheld the MWCA against challenges under the Equal Protection Clause. *See, e.g.,* West v. Plastifax, Inc., 505 So. 2d 1026 (Miss. 1987) (eliminating consortium claims by compensation's exclusiveness of remedy); Adams v. Petal Mun. Separate Sch. Dist., 487 So. 2d 1329 (Miss. 1986) (indicating right of public agencies to opt not to be covered by Act). However, the court has only upheld the MWCA against challenges under the Equal Protection Clause where the categories of claims or persons excluded were not protected by federal anti-discrimination laws or constitutional provisions. Now that there is a federal anti-discrimination law protecting persons with disabilities from arbitrary adverse employment action, the Mississippi Supreme Court may re-think its view that the MWCA does not similarly inherently protect the injured worker.

Supreme Court will react to the ADA. As a practical matter, the impact of the ADA will be, in the short term at least, through its regulation of the behavior of employers and employees pertaining to workers' compensation. The balance of this article is, therefore, devoted to informed speculation on how the ADA, as interpreted by the EEOC and in light of precedent under the Rehabilitation Act of 1973[31] will affect employer/employee relationships under workers' compensation.

To do so, this article will treat the issues "chronologically" within the employment relationship. It will begin by looking at the influence of the ADA on the hiring process. This discussion will be followed by an examination of how the ADA may affect employer behavior and Act administration in the absence of a compensable injury or compensation claim. It will then turn to the ADA's impact when an actual compensable injury and/or claim occurs. This discussion will deal both with the injury and its immediate aftermath, and with what happens to the worker after he reaches medical recovery, including issues related to accommodating the workers' return to the workplace and/or the workers' pursuit of claims under the ADA, the MWCA, or both.

A. *The Hiring Process*

The ADA contains an absolute prohibition against making any medical inquiries or requiring any medical examination of any applicant for employment, prior to making that applicant an offer of employment.[32] This provision was enacted because, in Congress' estimation, medical inquiries on employment application forms were often used to unfairly exclude applicants with disabilities from consideration for employment.[33] These exclusions were based on misconceptions or prejudices and not on any consideration of the applicants' actual ability to perform the job.[34] The ADA and its regulations limit inquiry at the application stage to questions pertaining directly to the performance of specific job related functions.[35] The questions may include requesting a demonstration or description of how an applicant would perform such functions.[36] This inquiry may not include questions concerning health but must be directed specifically to function.[37] Since workers' compensation histories do not fall within this limited exception, the EEOC's guidelines take the firm position that an employer may not make any inquiry whatsoever, at the pre-offer stage, about an applicant's worker's compensation history.[38]

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[31] 29 U.S.C.A. §§ 701-796 (West 1985 & Supp. 1992) [hereafter Rehabilitation Act]. In § 791 of the Rehabilitation Act, it prohibits discrimination, on the basis of handicap status, in federal employment. 29 U.S.C. § 791 (1992). In § 794 of the Act, it extends these protections to employees in federally funded programs, which, as a practical matter, covers almost all public sector employment at the state and local level as well. 29 U.S.C. § 794 (1992). The EEOC has promulgated regulations for the enforcement of both § 791 and § 794. *See* 29 C.F.R. § 1613 (1992) (setting forth regulations for § 791 of Rehabilitation Act); 34 C.F.R. § 104 (1992) (setting forth regulations for section 504 of Rehabilitation Act). The EEOC modeled many of its ADA regulations on its Rehabilitation Act regulations. 29 C.F.R. app. § 1630.4 (1992).

[32] 42 U.S.C.A. § 12112(d)(2) (West Supp. 1992). Tests to detect the use of

This is, indeed, entirely proper. The only purpose for taking a worker's compensation history or requiring medical dis-

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illegal drugs are not "medical examinations" within the meaning of the ADA. 42 U.S.C. § 12114(a), (d) (1992). Therefore, these tests may be conducted at any time in the hiring or employment process, if otherwise permitted under state law. 42 U.S.C.A. § 12114(d) (West Supp. 1992). The MWCA does provide for employee drug and alcohol testing if the employer has probable cause to suspect that an employee's injury was occasioned by intoxication or illegal use of drugs. MISS. CODE ANN. § 71-3-121 (Supp. 1992). Mississippi has also enacted a statute regulating employers' drug and alcohol testing programs. MISS. CODE ANN. § 71-7-1 (1972 & Supp. 1992). This statute specifically permits employers to require job applicants and employees to submit to tests for illegal drug and alcohol use. MISS. CODE ANN. § 71-7-5 (1972 & Supp. 1992). The ADA only excludes tests for illegal drugs from its definition of medical examination. 42 U.S.C.A. § 12114(a), (d) (West Supp. 1992). Therefore, it is possible that a pre-offer alcohol test given applicants would constitute a medical examination and run afoul of the ADA. The Workers' Compensation Act, however, does not require any such applicant testing.

[33] House Judiciary Report, *supra* note 3, at 42-43.

[34] House Labor Report, *supra* note 3, at 72-73.

[35] 42 U.S.C.A. § 12112(d)(2)(B) (West Supp. 1992); *see* 29 C.F.R. § 1630.14(a) (1992) (stating that employer may inquire about job functions at pre-employment stage); 29 C.F.R. app. § 1630.13(a) (1992) (indicating that employer cannot inquire about existence of disability at pre-employment stage).

[36] 42 U.S.C.A. § 12112(d)(2)(B) (West Supp. 1992); *see* 29 C.F.R. § 1630.14(a) (1992); 29 C.F.R. app. § 1630.13(a) (1992).

[37] 42 U.S.C.A. § 12112(d)(2)(B) (West Supp. 1992).

[38] 29 C.F.R. app. § 1630.13(a) (1992).

closures at the application stage, at least in the workers' compensation context, would be to engage in risk management through exclusionary presumptions concerning increased costs and decreased productivity.[39] Instead, the ADA mandates that the employer make an evaluation of the applicant's abilities without any opportunity to obtain information that might consciously or unconsciously prejudice that consideration.[40]

However, an employer is not required to actually employ persons who are not qualified for a job, even if the lack of qualifications stems from a disability.[41] In these cases, the disability must actually prevent the performance of an essential function of the job and the employer must be unable to make performance of the job function possible by reasonable accommodation of the disability.[42]

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[39] House Judiciary Report, *supra* note 3, at 31. As an example, this report discusses the rejection of applicants with back x-ray abnormalities but no symptomatic impairment, because of employers' "fear of injury as well as increased . . . workers' compensation costs." *Id.*

[40] 42 U.S.C.A. § 12112 (West Supp. 1992). Under the Act, an employer using improper presumptions concerning fear of injury or increased workers' compensation costs when considering a particular applicant could, essentially, make a nondisabled applicant become a person "regarded as having a disability." *Id.* If this occurred, the person would be protected by the Act and be a potential plaintiff in an ADA action against the employer. 42 U.S.C.A. § 12102(2)(c) (West Supp. 1992). *See also* House Judiciary Report, *supra* note 3, at 30-31 (discussing this concept of regarding person as one having disability); 29 C.F.R. § 1630.2(1) (1992) (listing three ways employee can be regarded as having disability); 29 C.F.R. app. § 1630.2(l) (1992) (stating that when employer considers person as having disability, that person is disabled). Of course, actually using such assumptions in making employment decisions would constitute substantive discrimination, in violation of the ADA. This could result in liability of the employer to the applicant who is rejected or not considered because of these assumptions. 42 U.S.C.A. § 12112(b)(1), (3), (6), (7) (West Supp. 1992). Moreover, liability could result if the employer conducted a prohibited medical inquiry. 42 U.S.C.A. § 12112(d) (West Supp. 1992). *See also* House Judiciary Report, *supra* note 3, at 31 (discussing prohibited medical exams), 29 C.F.R. §§ 1630.4, .7, .11, .13 (1992) (prohibiting discrimination in employment decisions and setting out prohibited medical examinations and inquiries); 29 C.F.R. app. §§ 1630.4, .11 (1992) (same).

[41] 42 U.S.C.A. §§ 12112, 12113 (West Supp. 1992). *See* 29 C.F.R. §§ 1630.2-.4, .15 (1992) (defining essential job functions and reasonable accommodations, prohibiting discrimination and setting out defenses).

[42] 42 U.S.C.A. §§ 12112, 12113 (West Supp. 1992); *see* 29 C.F.R. §§ 1630.2-.4, .15 (1992). An employer has wide leeway under the Act in determining what the essential functions of a position are, provided it has reduced a description of

Therefore, the ADA does permit employers to condition offers of employment on a job candidate's submission to a pre-employment physical exam.[43] The employer's entrance examination need not, itself, be job-related or consistent with business necessity.[44] However, if the employer chooses to withdraw an offer of employment because of something discovered in the course of the medical examination, it must show that the basis for using the revealed medical problem to disqualify the candidate is job-related and consistent with business necessity.[45] The employer must also show that the condition would actually prevent the offeree from performing an essential function of the position, and that reasonable accommodation of the condition to permit performance of the function is not possible.[46] Generally, an employer may not automatically rely on potential future harm that a condition, revealed by the employment examination, may cause as a justification for withdrawing a job offer. The circumstances under which an employer may not rely on potential future harm include times when the condition is asymptomatic or the exam reveals a history of a condition that is now asymptomatic, the condition has no current impact on the offeree's ability to perform the job and the condition requires no reasonable accommodation.[47] An offer may only be withdrawn if the condition disclosed is one which would cause the offeree to pose a "direct threat," to the health or safety of other individuals in the

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these essential functions to writing before applicants are sought or interviewed for a position. 42 U.S.C.A. § 12111(8) (West Supp. 1992). However, this does not create a statutory presumption that an employer's designation of essentialness is correct. A plaintiff in an ADA suit may always challenge this designation if he or she feels it was improper. House Judiciary Report, *supra* note 3, at 33-34.

[43] 42 U.S.C.A. § 12112(c)(3) (West Supp. 1992). The examination must be given to all employees in the same job category, regardless of disability or suspected disability, and the results of such examination must be kept confidential. The results cannot be used for anything except purposes specified in the Act and not inconsistently with the purposes of the Act. *Id.*; *see* 29 C.F.R. § 1630.14(b) (1992) (discussing employment entrance examinations); 29 C.F.R. app. § 1630.14(b) (1992) (same).

[44] 42 U.S.C.A. § 12112 (West Supp. 1992).

[45] 29 C.F.R. app. § 1630.14(b) (West Supp. 1992).

[46] House Labor Report, *supra* note 3, at 73-74.

[47] 42 U.S.C.A. § 12113 (West Supp. 1992).

workplace and the "direct threat" cannot be limited by reasonable accommodation.[48] Moreover, to establish such a "direct threat," an employer will have to show that the condition poses a high probability that serious harm will actually occur.[49] An employer must establish this high probability by objective factual evidence, not subjective perceptions, irrational fears, patronizing attitudes or stereotypes, about the nature or effect of a particular disability or of disability generally."[50] Also, the high probability of serious harm must be based strictly on valid, individualized medical and other data.[51] A company doctor's determination that such a threat exists may be challenged by other medical opinion and does not immunize an employer from liability in the event a court determines that the other medical opinion is more accurate.[52] Furthermore, the fact that employing a certain person will result in an increase in workers' compensation expenses to the employer is not legally sufficient to justify failing to hire that person.[53] Although expense is a consideration in whether accommodating a disability will cause an employer an undue hardship and may justify not accommodating the disability,[54] considerations of undue hardship do not enter into employment decisions concerning persons who can presently perform a job without accommodation.[55] Therefore, as a practical matter even though the ADA does allow employers to conduct pre-employment physicals, it does not permit employers to exclude an individual from employment solely because the physical reveals a condition that might result in future problems or will result in an increase in potential workers' compensation exposure.[56]

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[48] 42 U.S.C.A. § 12113(3) (West Supp. 1992); *see also* 29 C.F.R. § 1630.2(r) (1992) (stating that direct threat exists if person poses "significant risk of harm to health or safety of himself or others); 29 C.F.R. app. § 1630.2(r) (1992) (indicating that employer can require that employee not pose direct threat). The statute only provides for adverse action on the basis of a direct threat to others in the workplace. However, the EEOC construes "direct threat" to include a direct threat to the health or safety of the applicant him or herself. There is no support for this in the language of the statute. However, this is how the EEOC and many courts have interpreted the Rehabilitation Act of 1973, even though it is silent on the question. The Fifth Circuit, citing EEOC regulations pertaining to § 791 of the Rehabilitation Act, concluded that under § 794 of the Act, demonstrated risk of actual harm to the individual himself is sufficient grounds to justify adverse employment action. Chiari v. City of League City, 920 F.2d 311, 316-17 (5th Cir. 1991). The validity of Chiari as guidance for interpreting the ADA on this point is questionable, not only in light of the specific language of the statute, but also because of a subsequent decision of the United States Supreme Court. *See* UAW v. Johnson Controls, 111 S.Ct. 1196 (1991) (evincing disinclination on part of that Court to interpret anti-discrimination laws as protecting workers from themselves). The legislative history of the ADA also states, specifically, in the context of considering whether adverse action may be taken on the basis of potential risk, that the ADA is meant to counteract "paternalistic views about what is best for a person with a disability." *House Labor Report*, *supra* note 3, at 74. Ultimately, the courts will have to decide whether or not the statutory language is ambiguous, and if so, if these regulations are sufficiently reasonable and consistent with the applicable statutory purposes. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984) (discussing two questions court must answer when reviewing agency's construction of statute it administers). *Compare* Sullivan v. Everhart, 494 U.S. 83, 89 (1990) (holding that question is whether agency's interpretation is rational and consistent) *with* Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 171 (1989) (declaring Court must reject interpretations inconsistent with plain language of statute).

[49] 29 C.F.R. app. § 1630.2(r) (1992) (citing *Senate Report*, *supra* note 3, at 27; *House Labor Report*, *supra* note 3, at 56-57; *House Judiciary Report*, *supra* note 3, at 45-46).

[50] *Id.*

The ADA requires that information obtained in connection with an employment entrance examination be kept confidential and in separate files from other employment records. It also requires that the results be used only in a fashion consistent with the other employment provisions of the ADA.[57] However, the Act expressly allows the information to be shared with an employee's supervisors, so that they may make reasonable accommodation for an employee's disability; with safety personnel, if the employee's disability may require emergency treatment; and with government personnel investigating ADA compliance.[58] The EEOC finds that, notwithstanding the confidentiality requirements, an employer may also use the entrance exam to collect information for state-law mandated administrative purposes that do not conflict with the Act and disclose that information, as required by statute, to the appropriate state agency.[59] The EEOC's appendix guidelines expressly designate that collection and submission of data to a state workers' compensation commission for record-keeping and second injury fund purposes is included within this permitted confidentiality exception.[60]

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[51] *Id.*

[52] 29 C.F.R. app. § 1630.2(r) (1992); *see House Labor Report*, *supra* note 3, at 73-74 (stating that determination of reasonable probability of substantial harm should include consideration of more than just medical reports); *see also Chiari*, 920 F.2d at 317 (discussing physician testimony); Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985) (same).

[53] 29 C.F.R. app. § 1630.15(a) (1992).

[54] 42 U.S.C.A. §§ 12111(10), 12112(b)(5)(A) (West Supp. 1992).

[55] 42 U.S.C.A. §§ 12112(b)(1)-(4), (6)-(7) (West Supp. 1992).

[56] The Act makes no mention of post-offer, pre-employment "inquiries". 42 U.S.C.A. § 12112(c)(3) (West Supp. 1992). It states only that "a covered entity may require a medical examination after an offer of employment has been made." *Id.* Since the Act alludes specifically to inquiries in all other pertinent provisions, it is fair to assume that inquiry into an employee's workers' compensation history, as opposed to his or her health, is not permitted at the post-offer stage either. 42 U.S.C.A. §§ 12112(c)(1), (2), (4) (West Supp. 1992). Rather, inquiry is probably limited to the taking, by the physician performing the exam or his/her staff, of a medical history sufficient to competently perform the pre-employment physical.

The MWCA requires the filing of data for use in statutory assigned-risk and safety studies.[61] It also sets up a second injury fund to which employers may be required to submit data.[62] Clearly, under the ADA, Mississippi employers may collect and submit any data required by these provisions to the appropriate authorities. What the ADA prohibits employers from doing is using the data collected to refuse to employ or otherwise discriminate against a qualified offeree in ways prohibited by the Act.[63] Therefore, as a practical matter, the ADA effectively closes the door on the former practice of using certain information, collected during an employment physical, to make a blanket exclusion of prospective employees for workers' compensation risk management.[64]

Since the opportunities for employers to collect pre-employment health information from prospective employees is extremely circumscribed by the ADA,[65] there are fewer chances for applicants to make false statements concerning health matters. This is advantageous because any false statements might later be used against the applicant in the compensation arena or serve as legitimate non-discriminatory reasons for adverse actions in ADA suits.[66] Certainly, failure of a prospective employee to respond honestly to properly asked questions can serve as a legitimate non-discriminatory reason for adverse action against the employee, either at the hiring stage or thereafter. However, this is only true to the extent that such adverse action would have been permitted in the absence of the ADA. Nevertheless, to the extent that the applicant declines to respond to inquiries that a court ultimately determines were improperly made under the ADA, it is likely that the courts will not allow employers to use the failure to respond as a defense to ADA liability. The employee, of course, runs the risk that a court will determine that he should have made the disclosure and the non-disclosure itself will therefore justify the subsequent employment action.[67]

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[57] 42 U.S.C.A. § 12112(3) (West Supp. 1992).

[58] 42 U.S.C.A. § 12112(c)(3) (B) & (C) (West Supp. 1992).

[59] 29 C.F.R. app. § 1630.14(b) (1992).

[60] *Id.*

[61] MISS. CODE ANN. §§ 71-3-111, -121, -123, -73 (Supp. 1992).

[62] *Id.*

[63] 42 U.S.C.A. § 12112(c)(3)(C) (West Supp. 1992).

[64] *See supra* notes 16, 39, 40, 53 and accompanying text.

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[65] In addition to prohibiting most medical exams and inquiries, the Act also specifically prohibits an employer from asking if an individual has a disability. If the disability is self-evident, or is known by other means to the employer, it cannot ask how severe the disability actually is. 42 U.S.C.A. § 12112(c)(4) (West Supp. 1992); *see also* 29 C.F.R. app. § 1630.13(a) (1992) (discussing what employers may ask at pre-employment examination or inquiry).

[66] The MWCA punishes intentional false statements, made for the purpose of receiving compensation, as misdemeanors. MISS. CODE ANN. § 71-3-69 (1972 & Supp. 1992). Unlike some other states, Mississippi has never definitely interpreted the MWCA to prevent a claimant from receiving compensation because he made a misrepresentation, concerning medical problems, on his employment application. Emerson Elec. Co. v. McLarty, 487 So. 2d 228, 230 (Miss. 1986). However, where states do deny compensation for application misrepresentation, the misrepresentation must have been knowingly and wilfully made, substantially relied on by the employer in hiring the claimant, and the injury must have been causally related to the misrepresentation. *Id.*; *see* DUNN *supra*, note 16, §§ 47-50 (discussing misrepresentation on application); LARSON, note 16, § 47.53 (same). Under the ADA, after-acquired evidence of improper concealment or misrepresentation at the hiring stage will probably be treated the same way as such evidence is treated under other anti-discrimination statutes. The law in this area is in flux. *See* Washington v. Lake County, 969 F.2d 250, 256 (7th Cir. 1992) (where plaintiff filed on application and was later fired for another reason, ask whether employer would have fired employee upon discovery of misrepresentation); Summers v. State Farm Mut. Auto Ins. Co., 864 F.2d 700, 708-09 (10th Cir. 1988) (holding that employee's falsification of company records, after warning not to falsity prevented him from recovering for age and religious discrimination). *Compare* Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992) (stating that employer may not use after-acquired evidence of misrepresentation on application to defeat liability, only limit damages) *with* Milligan-Jensen v. Michigan Tech. Univ., 975 F.2d 302, 304 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 263 (1992) (holding that employee's misrepresentations on employment application prevented recovery for discrimination in her firing because employer established it would not have hired her or would have fired her if it knew of misrepresentation) *and* Dotson v. U.S. Postal Serv., 976 F.2d 977-78 (6th Cir. 1992) (where plaintiff lied on application and was later fired for another reason ask whether employer would have fired employee upon discovered misrepresentation) 961 F.2d 1576 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 263 (1992) (stating that employer entitled to prevail, even on summary judgment, if after-acquired evidence would have justified not hiring or terminating employee).

In addition, an applicant who chooses not to disclose a medical problem, even when he is not required to do so, runs certain risks. Chief among these risks is, of course, that if he is hired in a job that he is medically incapable of doing, he will either injure himself or be unable to perform the duties of the job and be fired for legitimate reasons of incompetence.[68] Also, a prospective employee who declines to voluntarily disclose a disabling condition may give up the right to have an employer reasonably accommodate that condition.[69]

Hopefully, employer compliance with the ADA will be sufficiently pervasive, so that prospective employees will feel comfortable making relevant disclosures and seeking reasonable accommodations up front. This would enable the parties to the employment relationship to work together to maximize both productivity and safety, and ensure that the applicant becomes a successful long-term employee once he is hired.

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[67] *Dotson*, 976 F.2d at 977-78.

[68] Although a few people commit deliberate compensation fraud, most people prefer good health and a steady paycheck to painful injury and a finite amount of workers' compensation that will never be more than two-thirds of their actual earnings. MISS. CODE ANN. § 71-3-13 (Supp. 1992). Concealment generally arises out of a desire to get the job, not the hope of suffering a disabling injury while on the job. Perhaps with the protections of the ADA, newly hired workers will be more forthcoming.

[69] In the case law that developed under the Rehabilitation Act, some courts have imposed a burden on employers to accommodate known disabilities even in the absence of a request for such accommodation. *See, e.g.*, Kimbro v. Atlantic Richfield Co., 889 F.2d 869 (9th Cir. 1989), *cert denied.*, 112 L.Ed. 2d 28 (1990). However, the thrust of the ADA seems to be that individuals with disabilities should get to decide what they want to disclose, and when, if at all, they will seek accommodation. *See* 42 U.S.C.A. § 12201(d) (West Supp. 1992) (indicating that individual with disability is not required to accept accommodation); *House Labor Report*, *supra* note 3, at 74 (same); *Senate Report*, *supra* note 3, at 39-40 (same); *House Judiciary Report*, *supra* note 3, at 44 (same); 29 C.F.R. app. § 1630.9(d) (1992) (permitting an individual to decline an accommodation if not requested or needed).

B. During the Employment Relationship

1. In the absence of a compensable injury or workers' compensation claim.

Once an individual is actually hired and goes to work, he continues to be protected by the ADA. The employer is free to continue collecting and reporting data required for workers' compensation administrative or second injury purposes.[70] It is also permissible for the employer to make ongoing inquiries of its employees, as it could its applicants, concerning their ability to perform specific functions of their jobs.[71] Additionally, the employer is now permitted to subject the individual to "fitness for duty" medical examinations, and to inquire concerning the existence or severity of any disabilities, but only to the extent that the examinations or inquiries are job related and consistent with business necessity.[72]

Examinations to ensure that employees comply with state, federal or local safety standards in regulated industries are clearly permitted, so long as the standards themselves are consistent with the ADA.[73] However, an employer cannot require examinations purportedly required by, or take actions in reliance on, state or local laws that are inconsistent with the

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[70] 42 U.S.C.A. § 12112(c)(4)(B) (West Supp. 1992).

[71] *Id.*

[72] 42 U.S.C.A. § 12112(c)(4)(A) (West Supp. 1992); *see also* 29 C.F.R. § 1630.14(c) (1992) (indicating that employer can require medical exam that is job-related and necessary for business purposes); 29 C.F.R. app. § 1630.14(c) (1992) (same). The ADA also permits voluntary medical exams if they are given as part of employee health plans. 42 U.S.C.A. § 12112(c)(4)(B) (West Supp. 1992).

[73] *See House Labor Report*, *supra* note 3, at 74 (stating that such standards may include federal safety standards and laws establishing medical requirements); *House Judiciary Report*, *supra* note 3, at 43 (same); 29 C.F.R. § 1630.14(c) (1992) (same); 29 C.F.R. app. § 1630.14(c) (1992) (same).

ADA.[74] For example, a local law which absolutely prohibited the employment of persons with certain conditions in certain jobs without individualized inquiry would be inconsistent with the ADA. Also, employers may not target a particular employee, who is suspected of having a disability for monitoring, if the suspected disability is not affecting the employee's job performance in any way.[75] This is because inquiry or examination under those circumstances would not be job related.[76]

The MWCA does not impose any specific safety standards on employers, except minimal ones relating to drug and alcohol abuse.[77] Thus, except for data collection activities required by the Commission for second injury and assigned risk studies, there are no requirements under MWCA that would independently justify either medical examinations and inquiries, or adverse employment actions. An employer certainly has no more right to make overly broad risk management assumptions about incumbent employees than it does about applicants. Therefore, the employer must establish that an individual employee with a disability, detected in a fitness for duty exam, actually poses a "direct threat," as defined in the Act, prior to taking an adverse action against that employee.[78] Any inquiries or examinations to detect such a "direct threat" must be conducted in a job related, non-discriminatory fashion and be motivated by something other than subjective perception, irrational fears, patronizing attitudes, or stereotypes.[79] Of course, medical information collected in the course of job-related medical examinations of employees is subject to the same confidentiality and other use provisions as information collected in connection with employee entrance examinations.[80]

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[74] 29 C.F.R. app. § 1630.1(b)(c) (1992).

[75] *See Senate Report*, *supra* note 3, at 39-40; *House Labor Report*, *supra* note 3, at 75.

[76] *Id.*

[77] *See supra* note 32 and accompanying text.

[78] *See supra* notes 40-56 and accompanying text.

[79] *Id.*

[80] 42 U.S.C.A. § 12112(d)(4)(C) (West Supp. 1992); *see supra* notes 58-63 and accompanying text.

2. *When a Compensable Injury or Workers' Compensation Claim Occurs.*

Once an employee suffers a compensable injury or makes a workers' compensation claim, the ADA can become implicated in several ways.[81]

First, the MWCA requires employees to notify their employers of work related injuries.[82] It also requires employers to file reports with the Mississippi Workers' Compensation Commission (MWCC) concerning any injury of which they have notice, to furnish medical treatment for any such injury and if the injury prevents the employee from working for more than five days, to pay weekly workers' compensation benefits to the employee.[83] To accomplish this, an employer and/or its compensation carrier or administrator must obtain medically related information from the employee and the employee's doctors, and disclose that information to the MWCC.[84] Clearly, insofar as the medical information collected and submitted is used only for the purpose of processing, and, if necessary, disputing and/or defending against the workers' compensation claim, the ADA does not interfere with this.[85] It does, however, require that medical or disability related information collected in connection with compensation claims be kept otherwise separate and confidential.[86] This information is not to be used for purposes inconsistent with the ADA or to violate the provisions of the Act.[87] For example, if the employee is left, as a result of a compensable injury, with an x-ray abnormality to his back, that is asymptomatic and does not affect his ability to perform his job or pose a direct threat to health and safety, the employer cannot remove him from his job for risk management purposes. Similarly, the employer could not have declined to hire him because of such an abnormality in the first place.[88] On the other hand, an employer may certainly use the information to make a requested reasonable accommodation for the employee if the medical information reveals a disability that affects the employee's work, but can be reasonably accommodated to permit the employee to continue working.[89] However, it is likely that the confidentiality provisions of the ADA will prevent a former employer from disclosing the existence of or information concerning a compensation claim when it is requested by a subsequent employer in the absence of express written consent of the employee.[90] Also, a former

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[81] The MWCA provides for compensation in the case of both injury and occupational disease. MISS. CODE ANN. § 71-3-1 (1972). Although standards for compensating occupational diseases differ in some ways from those for compensating injuries, for purposes of the interface between workers' compensation and the ADA, differences between how the MWCA treats industrial diseases and industrial injuries are largely irrelevant. Therefore, unless otherwise specified this article will use the term "compensable injury" to include any compensable condition.

[82] MISS. CODE ANN. § 71-3-35 (1972). Recovery is dependent upon specified limitations. *Id.*

[83] MISS. CODE ANN. § 71-3-1, -7, -35, -67 (1972). Even if an injured employee does not personally report his or her injury, an employer that learns of an injury in some other fashion is said to have notice of that injury and an employee's claim is not prejudiced by failure to give notice. MISS. CODE ANN. § 71-3-35 (1972 & Supp. 1992). The employer undoubtedly has the right to investigate to see if the employee is really injured. Presumably, the employer should ask the employee whether or not he or she actually suffered an injury. The employer must file a report with the Commission within 10 days of any injury or death. MISS. CODE ANN. § 71-3-67 (1972 & Supp. 1992).

[84] MISS. CODE ANN. § 71-3-65, -67 (1972 & Supp. 1992). Insofar as workers' compensation claims involve either workers' compensation carriers or outside compensation administrators who have contracted with self-insured employers, these entities must as a practical matter also comply with the ADA. This is because "an employer . . . may not do through a contractual or other relationship what it is prohibited from doing directly." 29 C.F.R. app. § 1630 (1992); *see* 42 U.S.C.A. § 12112(b)(2) (West Supp. 1992) (prohibiting contracts from circumventing statute); 29 C.F.R. § 1630.6 (1992) (participating in contractual arrangement will have

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same consequences as directly breaking law).

[85] 29 C.F.R. app. § 1630.14(b) (1992); *see supra* notes 59-63 and accompanying text. Also, to the extent that the MWCA is a state law which provides a measure of protection of the rights of individuals with disabilities by furnishing them with medical care and compensation, the ADA cannot be construed to limit the procedure by which it does so. 42 U.S.C.A. § 12201(b) (West Supp. 1992). Finally, the collection and submission of medical and disability information from and concerning an injured compensation claimant is undoubtedly job related and consistent with the business necessity of furnishing workers' compensation benefits and medical treatment to the injured employee. 29 C.F.R. § 1630.14(c)(1)(2) (1992).

[86] 42 U.S.C. § 12112(d)(4)(C) (1992).

[87] *Id.*

[88] *See supra* notes 39, 40, 48-55 and accompanying text.

[89] 42 U.S.C. § 12112(d)(3)(B) (1992); *see Kimbro*, 889 F.2d at 869 (finding employer could reasonably accommodate machinist's migraine by granting his leave of absence)

[90] 42 U.S.C.A. § 12112(d)(4)(C) (West Supp. 1992). The employer seeking this

employer probably cannot use the information in legal proceedings unrelated to either the compensation claim or an ADA claim arising out of the employer's treatment of the individual vis a vis his workers' compensation injury.[91]

Secondly, once the employee suffers an injury, he may suddenly become an individual with a disability, within the meaning of the Act, to whom the employer owes duties of nondiscrimination and reasonable accommodation.[92] These duties would be in addition to any duties under the state workers' compensation act to pay weekly benefits and provide medical care.[93] Interestingly, it is here that the ADA's protection of an injured employee becomes most problematic. The ADA requires that for a condition to be disabling within the meaning of the Act, it must "substantially limit," or be regarded as substantially limiting, one or more of an individual's major life activities.[94] The EEOC regulations suggest that the duration of an impairment and its ensuing impact are relevant in determining whether or not an impairment is sufficiently substantially limiting, within the Act's requirements, to be a covered disability.[95] Plainly, if there is a short term acute injury that heals but has a permanent post-healing impact on a major life activity, that injury and its long term impact

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information could not, of course, have sought either this information or authorization from the employee at the application stage, and probably not even in connection with the pre-employment physical. *See supra* notes 32-56 and accompanying text. However, an employer gathering job related information on an employee who has already been hired, might seek authorization from the employee to obtain this information from former employers, if the employee has requested accommodation or there is another job-related reason to do so. Insofar as this information is submitted to the MWCC in connection with non-controverted cases, the MWCA provides for confidentiality as well. MISS. CODE ANN. § 71-3-66 (1972).

[91] 42 U.S.C.A. § 12112(d)(4)(C) (West Supp. 1992). This could include subsequent compensation claims where the injury is unrelated to the previous injury and no apportionment issues arise. *Id.* It could also include unrelated civil or criminal proceedings in which an employer's records concerning an employee were requested by third parties or even by the employer itself. *Id.*

[92] 42 U.S.C.A. §§ 12111(8), 12112(b)(5)(A) (West Supp. 1992).

[93] 42 U.S.C.A. § 12112(a) (West Supp. 1992).

[94] 42 U.S.C.A. § 12102(2)(A) (West Supp. 1992).

[95] 29 C.F.R. § 1630.2(j)(2)(ii) (1992). Even if the only major life activity impaired is working, the impairment is considered disabling. 29 C.F.R. § 1630.2(1)(i) (1992).

combine to make the injury a protected disability from the beginning.[96] On the other hand, where a temporary, non-chronic, short-duration impairment has no long term or permanent impact, the EEOC believes that this sort of injury is "usually" not a disability.[97]

This exception to the definition of disability could, arguably, open the way for employers to take adverse employment action. For example, an employer could immediately dismiss employees who suffer only short term, temporary impairments as a result of compensable injuries, without running afoul of the ADA. However, this is a much smaller loophole than it may seem at first glance.

To begin with, it is often not possible to determine immediately whether any given workers' compensation injury will be of long or short duration. One worker may recover from a work related knee injury and operation with no residuals and another may spend the rest of his or her life using a cane for stability. If an employer dismisses the latter worker the day after it receives notice of the injury, without having considered whether the long term impact of the injury will interfere with the employee's ability to perform the essential functions of his or her job, or whether it would be possible to reasonably accommodate that impairment, the employer could be liable for discrimination under the ADA.[98] The potential liability could be based on improperly using the injury to screen the worker out of his or her former job and failing to reasonably accommodate the worker.[99] If the employer fired a worker who ultimately recovered without residuals, it could be deemed to have improperly regarded the worker as having a disabling impairment and be held liable for having improperly dismissed him because of that perceived impairment.[100] Even if the employer purports to have a policy of dismissing all workers who have missed work for short durations, regardless of reason, it could still run afoul of the ADA. Such a policy would undoubtedly harm workers with injuries and illnesses that would ultimately qualify as disabilities more than it would harm workers whose reasons for missing work were not related to medical conditions at all. Policies that are uniformly applied, but have a disparate impact on disabled persons, are illegal under the ADA, unless justified by business necessity.[101]

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[96] 29 C.F.R. app. § 1630.2(j) (1992). An example of this, according to the EEOC, is a broken leg that is totally disabling for a relatively short eight-week period but leaves the person with a permanent limp. *Id.* It also uses a head injury that heals but leaves residual cognitive impairments as an example. *Id.*

[97] *Id.* According to the EEOC, broken limbs and concussions are examples of such non-disabilities. *Id.* The Fifth Circuit has reached a similar conclusion under § 794 of the Rehabilitation Act of 1973. Evans v. City of Dallas, 861 F.2d 846, 852-53 (5th Cir. 1988) (citing Southeastern Community College v. Davis, 442 U.S. 397, 405-06 (1979)). However, *Evans* treated the issue only collaterally and there will undoubtedly be considerable litigation attempting to limit the scope of this decision in the ADA context.

[98] 42 U.S.C. § 12112(b)(5), (6) (1992).

[99] *Id.*

Accordingly, the safest practice for employers who wish to avoid ADA problems arising out of how they handle workers' compensation claims would be to treat any workers compensation injury as if it were a disability within the meaning of the ADA.

Thus, once an injury has occurred, which affects the employee's ability to stay on his job, the first inquiry would be to determine whether the injury prevents the employee from performing an essential function of his/her job on a short or long-term basis.[102] Things that an employee sometimes does, but which are not central to the employee's position and can be done by other employees, are generally not considered essential and no adverse action can be taken against the employee if his/her condition prevents only those duties from being performed.[103] If it is determined that the injury does impair performance of an essential function, the employer must consider if the impairment can be reasonably accommodated without undue hardship to itself.[104] Statutorily, an employer's duty to reasonably accommodate requires that it consider not only the removal of barriers that impede a disabled employee's performance of his/her job duties, but also affirmative measures, such as, job restructuring; modifications of work schedules, including giving an employee part-time work; reassignment of an employee to a vacant position; and modification or replacement of equipment or standard work procedures.[105] An employer may not decline to implement one or more of these accommodations on the grounds of undue hardship, unless it can show that the accommodation would be "unduly costly, extensive, substantial or disruptive, or that would fundamentally alter the nature or operation of the business."[106] It may also not deem cost to be a hardship if it can

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[100] *See supra* note 40 and accompanying text.

[101] 42 U.S.C.A. § 12112(b)(3)(A) (West Supp. 1992); *see also* 29 C.F.R. § 1630.7 (1992) (stating that it is unlawful for employer to use certain "standards, criteria, or methods of administration"). Additionally, such policies might run afoul of Title VII, insofar as it prohibits discrimination on the basis of pregnancy. 42 U.S.C.A. § 2000e(k) (West 1981). A blanket policy which denies employers any leeway in according employees leave would also probably adversely affect an employer's ability to maintain longevity in its workforce and would, therefore, make very little sense economically.

[102] 42 U.S.C.A. § 12111(8) (West Supp. 1992); *see also* 29 C.F.R. § 1630.2(n) (1992) (defining essential function); 29 C.F.R. app. § 1630.2(n) (1992) (same).

[103] 29 C.F.R. app. § 1630.2(n) (1992); *see also* Treadwell v. Alexander, 707 F.2d

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473, 478 (11th Cir. 1983) (requiring overburdened employees to double up and shift undue hardship).

[104] 42 U.S.C.A. § 12111(9), (10) (West Supp. 1992); *see also* 29 C.F.R. §§ 1630.2(o), (p) (1992) (defining reasonable accommodation and undue hardship). Often, an employee with a compensation injury will be temporarily, totally disabled from all functions of a job, in which case the Act requires that he be treated like any other employee on short term leave, during that period. 29 C.F.R. app. § 1630.2(o) (1992). However, an employee may, even before he has reached maximum recovery for purposes of the MWCA, recover to the point that a return to reasonably accommodated light duty would be possible. *Id.* This could mean that there would be a series of slightly different reasonable accommodations that would have to be considered by the employer as the employee progressed towards maximum medical recovery. *Id.*

[105] 42 U.S.C.A. § 12111(9) (West Supp. 1992); *see* 29 C.F.R. § 1630.2(o) (1992). The conventional wisdom of the Rehabilitation Act of 1973 has been that job reassignment was not required as a reasonable accommodation, unless such reassignment was traditionally offered to employees who could not perform their jobs for reasons other than disability. *See, e.g.,* School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987) (employer not required to find another job for handicapped employee not qualified for her job, however, cannot deny "alternative employment opportunities reasonably available"); Griffin v. Defense Mapping Agency, 864 F.2d 1579, 1581 (Fed. Cir. 1989) (finding no reasonable accommodation due individual who fails to get required security clearance for job). With respect to the reassignment of an employee to a vacant position, the ADA appears to differ somewhat from the Rehabilitation Act of 1973. *See* 29 C.F.R. app. § 1630.2(o) (1992).

[106] 29 C.F.R. app. § 1630.2(p) (1992).

get funding for the accommodation from any outside source, including voluntary funding by the disabled person himself.[107]

Like other decisions under the Act, determinations concerning undue hardship and reasonable accommodation must be made on an individualized case-by-case basis, taking into account the needs of the particular employee and the resources of the particular employer.[108] Thus, a small employer with one employee who performs a particular function may suffer undue hardship from any restructuring or scheduling modification and may have no vacant positions available for reassignment.[109] Such an employer would probably not be required to accord an injured employee extensive temporary leave to recover his or her health or to change the job duties in a significant way if the disability was permanent.[110] On the other hand, an employer with several employees performing a particular function may be able to redistribute the tasks involved in performing the functions in a way that accommodates the worker with a disability.[111] Unlike Title VII of the Civil Rights Act, which prohibits any sex or race-based discrimination, whether directed at the traditionally discriminated-against groups (e.g., women or minorities) or the traditionally privileged group (e.g., white males), the ADA does not grant any rights to people without disabilities. Thus, an employer cannot use non-disabled workers' objections to the accommodation of a disabled worker as grounds for declining to accommodate the disabled worker, even if there is an adverse effect on non-disabled employees.[112]

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[107] 42 U.S.C.A. § 12111(10)(B) (West Supp. 1992); *see Senate Report, supra* note 3, at 35 (discussing showing hardship); *House Labor Report, supra* note 3, at 67 (same); 29 C.F.R. § 1630.2(p) (1992) (defining undue hardship); 29 C.F.R. app. § 1630.2(p) (1992) (same); *see also* Lawrence DePostol & David D. Kadue, *An Employer's Guide to the Americans With Disabilities Act: From Job Qualifications to Reasonable Accommodations*, 24 J. MARSHALL L. REV. 693, 711-23 (1991) (discussing reasonable accommodation and undue hardship). For more detailed coverage of both reasonable accommodation and undue hardship, see discussions elsewhere in this issue.

[108] 29 C.F.R. app. § 1630.9 (1992).

[109] *Id.*

[110] *Id.* On the other hand, the EEOC does encourage employers to look at job functions in terms of what the job actually accomplishes, rather merely at what physical strength is required. *Id.* An example of this is a Sack Handler who is required to move fifty pound sacks from one end of a warehouse to the other. *Id.* The EEOC encourages employers to view this job not as one which requires the carrying of fifty pounds by an individual, but rather as requiring the movement of these fifty pound sacks across the warehouse. *Id.* It suggests that if an employee could still lift the fifty pound sacks but not carry them, then provision of a cart or dolly to do the actual transportation would be a necessary reasonable accommodation. *Id.*

[111] 29 C.F.R. app. § 1630.2(n) (1992).

Although the principles of reasonable accommodation and undue hardship are the same whether the accommodation is expected to be permanent or only temporary, the actual result of the application of those principles may differ.[113] For example, purchasing a new piece of equipment or re-designing a machine so an injured employee can continue to do his job may be economically feasible if the need is likely to be permanent and the cost of not doing so is the permanent loss of a valued, skilled worker and the consequent need to find and/or train another.[114] However, it may not be feasible if the new equipment or design modification would be needed only for a few months and would then have to be removed.[115] Conversely, an employer may be able to temporarily re-assign heavy duties to other workers and thus permit an injured worker a finite period of light duty, but may not be able to sustain this on a long-term basis due to production requirements in the industry.[116] These determinations must be made on a case-by-case basis, as the need arises, because an accommodation that imposes an undue hardship on one employer or at one time may not do so on another employer or at another time.[117]

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[112] 29 C.F.R. app. § 1630.15(d) (1992). A possible exception to this may be where an otherwise reasonable accommodation would run afoul of non-disabled employees' rights under a collective bargaining agreement that was negotiated in good faith before the effective date of the ADA. *Id.* Since unions are covered entities under the Act, future collective bargaining agreements will be subject to ADA requirements and can probably not include provisions which will substantially interfere with the purposes of the ADA. In contrast to Title VII, the ADA makes no special exceptions for bona fide seniority systems or any other area traditionally controlled by collective bargaining. 42 U.S.C.A. § 12112(b)(2) (West Supp. 1992). It expressly makes it illegal to contract in any way that discriminates. *Compare* 42 U.S.C.A. § 2000e-2(e) (West Supp. 1981) (allowing classification or admittance based on sex, religion or natural origin if it is "reasonably necessary to the normal operation of that particular business") *with* 42 U.S.C.A. § 12112(b)(2) (West Supp. 1992) (prohibiting discrimination based on disability, for any reason). However, in the meantime, pre-existing rights under collective bargaining agreements may serve as justification for non-accommodation. *See generally* Joanne J. Ervin, Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990, 1991 DET. C. L. REV. 925, 954-71 (discussing reasonable accommodation and collective bargaining agreements under ADA).

[113] 29 C.F.R. app. § 1630.15(d) (1992).

[114] *Id.*

Any ambiguities over what the ADA may require in the way of accommodating an injured worker during a temporary partial disability period dissolve once maximum medical recovery is reached.[118] If the employee can currently perform the essential functions of his job, without reasonable accommodation he may not be denied the right to continue doing it, unless permitting him to do so would pose a "direct threat" to health and safety, as defined in the Act, which could not be eliminated by reasonable accommodation.[119] If the employee cannot perform an essential function of his position by virtue of the permanent effects of his injury, then the employer must perform the analysis discussed above to determine whether reasonable accommodation would permit the performance of the job. If reasonable accommodation would enable the worker to perform his job, the employer must provide the reasonable accommodation, unless doing so would work an undue hardship on the employer.[120]

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[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] The Mississippi Workers' Compensation Law specifically provides for the payment of temporary partial disability benefits, where appropriate, during the healing period following an injury. MISS. CODE ANN. § 71-3-21 (Supp. 1992); *see* DUNN, *supra* note 16, § 75 (discussing this code section). However, since hearings cannot be held every two weeks to determine the degree of temporary disability, Komp Equip. Co. v. Clinton, 112 So. 2d 541 (Miss. 1959), employers, as a practical matter, tend to take an all-or-nothing approach to temporary disability payments. They pay for total disability until the employee is released to return to work at full pay and nothing thereafter. To the extent that ADA-mandated accommodation during a healing period could involve a return to part-time work or other duties that did not involve full pay, the issue of payment of temporary partial disability benefits in addition to reduced pay could arise.

[119] 42 U.S.C.A. §§ 12113(b), 12111(3) (West Supp. 1992); *see* 29 C.F.R. § 1630.2(r) (defining direct threat); *see supra* notes 48-56 and accompanying text.

Assuming an employer is willing to make an accommodation and the accommodation does allow the injured employee to resume his former duties on a permanent basis, this will generally eliminate not only the possibility of an ADA claim but also the need for any further payment of workers' compensation.[121] Permanent disability benefits under the MWCA are payable only where there is a loss of wage earning capacity associated with the injury.[122] Under the MWCA, when an employee returns to work and receives the same or greater earnings than those received prior to the injury, presumption arises that there is no loss of wage earning capacity.[123] However, the employee may rebut this presumption by producing evidence that actual post-injury wages are an unreliable indicator of true post-injury wage earning capacity.[124] Thus, to the extent that the ADA enhances post-injury employment opportunities, it may actually result in lower workers' compensation costs to employers. It will also undoubtedly result in the Mississippi Workers' Compensation Commission and the Mississippi courts having to consider ADA precedent and standards in evaluating loss of wage earning capacity issues in workers' compensation claims.

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[120] *See supra* notes 104-112 and accompanying text.

[121] 29 C.F.R. app. § 1630.2(o) (1992).

[122] MISS. CODE ANN. §§ 71-3-17(a), (c)(1)-(23), (25) (Supp. 1992). These sections discuss permanent total disability, permanent disability for loss of a scheduled member and permanent partial disability for loss of a non-scheduled member. However, compensation of up to $2,000 may be paid for facial or head disfigurement, without regard to loss of wage earning capacity. MISS. CODE ANN. § 71-3-17(c)(24) (Supp. 1992).

[123] DUNN, *supra* note 16, at § 67; *see* International Paper v. Kelley, 562 So. 2d 1298, 1303 (Miss. 1990) (creating no loss of wage earning capacity); Agee v. Bay Springs Forrest Prod., 419 So. 2d 188, 189 (Miss. 1982) (stating well-settled rule of presumption of no loss of wage earning capacity).

[124] DUNN, *supra* note 16, §§ 67-68 (Supp. 1990). In the pre-ADA context, factors which could rebut the presumption of no loss of wage earning capacity included evidence that the disability caused the post-injury earnings to be "temporary and unpredictable" or disproportionate to actual earning capacity due to an employer's sympathy towards the claimant. Other factors were those "indicative of a temporary status, subject to the whims of persons or the continuance of conditions beyond control or prediction." DUNN, *supra* note 16, § 68; *see also* General Elec. v. McKinnon, 507 So. 2d 363, 365 (Miss. 1987) (discussing rebuttable presumption of no loss of wage earning capacity where claimant's post-injury earnings equal or exceed pre-injury wages). These factors all recognize, and to some degree compensate for, paternalistic, stereotyped employer attitudes toward people with disabilities that, in the past, have resulted in the inability of such persons to successfully return to the workforce on a permanent basis. To the extent that the ADA actually eliminates employment decisions "based on paternalistic views

Unfortunately, an employer and employee may not always see eye to eye on what should happen following maximum medical recovery, and litigation may ensue under the MWCA, the ADA, or both.

Litigation could arise where an employee seeks to return to his former work, either with or without reasonable accommodation, and the employer declines to permit it, alleging that the employee's disability prevents the employee from performing the essential duties of his job and that no reasonable accommodation is possible.[125] This situation could arguably generate mutually consistent, simultaneous ADA and workers' compensation claims. In the ADA forum, the employee could attempt to prove discrimination in any aspect of the employer's decision.[126] At the same time, since the employer was, in fact, impairing the employee's wage earning capacity, a worker's compensation claim could be pursued as well.[127] If

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about what is best for a person with a disability," House Labor Report, *supra* note 3, at 74, or "'myths, fears, and stereotypes' associated with disabilities," 29 C.F.R. app. § 1630.2(1) (1992), these factors may cease to be viable rebuttal evidence on loss of wage earning capacity questions.

[125] 29 C.F.R. § 1630.9(a) (1992).

[126] 42 U.S.C.A. § 12112(a) (West Supp. 1992). For example, the employee could establish discrimination by showing that the essential functions of the job allegedly impaired either were not in fact impaired or were not essential. He could also demonstrate that a reasonable accommodation of the problem was in fact possible and rebut any showing by the employer that the accommodation would cause the employer undue hardship. If he prevails in the claim, he would be entitled to reinstatement in his position with reasonable accommodation if necessary, back pay, and attorney's fees under 42 U.S.C.A. § 2000e-5(g)(1) (West Supp. 1992). 42 U.S.C.A. § 12117(a) (West Supp. 1992).

[127] MISS. CODE ANN. § 71-3-9 (Supp. 1992). Nothing in either the MWCA or the ADA precludes mutual pursuit of the claims as a matter of law. The ADA contains specific language disclaiming any intent to pre-empt or limit state remedies that provide greater or equal protection. 42 U.S.C.A. § 12201(b) (West Supp. 1992). The exclusiveness of the liability provisions of § 71-3-9 of the Mississippi

the employee prevails in the ADA forum, any workers' compensation paid in the interim could be offset from the backpay awarded in the ADA claim. If the ADA forum vindicates the employer's position and finds that the employee could not resume his former duties, with or without reasonable accommodation, then the award of workers' compensation, to the extent that the inability to resume former duties reflected a loss of wage earning capacity, would be the only proper remedy.

A second situation is presented where an employee rejects an offer to return to work with what the employer deems to be a reasonable accommodation, either because the employee believes that the accommodation is insufficient or because he feels that no accommodation would be possible. Here, the employer may attempt to use the ADA defensively in the workers' compensation forum to contend that the offer actually eliminated the employee's claimed loss of wage earning capacity.[128] On the other hand, the employee may be able to show that the ADA required a different or more extensive accommodation than the one offered and may be able to demonstrate in the workers' compensation forum that the offer did not counteract the loss of wage earning capacity the worker actually suffered because of his justified refusal to accept the employer's offer.[129]

If the employee's contention is that he could perform the work if the proper accommodation was made, he could also

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Code do not affect employee's rights to make claims under anti-discrimination statutes. Alexander v. Gardner Denver Co., 415 U.S. 36, 48-49 (1974); *see also* Miller v. Bolger, 802 F.2d 660, 664-65 (3d Cir. 1986) (holding recovery under Federal Employees Compensation Act does not preclude Title VII remedies for discrimination). Moreover, employers may not rely on state law to avoid meeting their obligations under the ADA. 29 C.F.R. app. § 1630.1(b-c) (1992).

[128] Employers may also attempt to show that even if the employee is, in fact, incapable of returning to his former employment, the ADA's provisions greatly expand alternative employment available to a disabled employee. They may try to show that this would eliminate any loss of wage earning capacity in the workforce in general.

[129] Again, the state workers' compensation commission or state courts would ultimately have to decide what the ADA actually required, in the way of accommodation, in order to decide this claim.

simultaneously file an ADA claim alleging that the employer's offer violated the reasonable accommodation provision of the Act and seek to force the employer to re-employ him with the appropriate accommodation.[130]

Yet another potential interface between the ADA and workers' compensation would arise if an employee sought accommodation of a disability and the employer agreed that the accommodation was technically possible but claimed implementation of that accommodation would cause the employer undue hardship.[131] Since an undue hardship claim will often involve an employer attempting to show that the accommodation is too costly, an employee could request that the cost of workers' compensation, which the employer will pay if the claimant loses wage earning capacity, be deducted from the cost the employer contends the accommodation would entail. Since hardship determinations should be based on the net cost of the accommodation as compared to the alternatives, this argument might allow the employee to win.[132]

A final point of intersection between the ADA and the MWCA may be found where the employee who has suffered a compensable injury was already an individual with a disability and the employer had, as required by the ADA, either disregarded the disability, if it did not affect an essential function or pose a "direct threat," or reasonably accommodated the disability.[133]

If the pre-existing disability results from the loss or loss of the use of an organ or member listed in the MWCA's second injury provision, and the compensable injury in question causes a permanent and total incapacitation through the loss or loss of the use of another organ or member, the employer is only responsible for compensation that would be payable for the injury that occurred at its own work place.[134] The balance of the compensation due for total disability would be paid from the state's second injury fund.[135]

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[130] 42 U.S.C.A. §§ 12112(b)(5)(B), 12117(a) (West Supp. 1992). However, punitive and compensatory damages would be foreclosed if the employer could establish that the accommodation it offered was a good faith effort after consultation with the claimant. 42 U.S.C.A. § 1981a(a)(3) (West Supp. 1992).

[131] 29 C.F.R. app. § 1630.9 (1992).

[132] 29 C.F.R. app. § 1630.2(p) (1992).

[133] MISS. CODE ANN. § 71-3-73 (Supp. 1992).

[134] *Id.* The listed members that qualify for first injury status are hand, arm,

If a pre-existing disability is not covered by the second injury fund, an employee claiming worker's compensation may face an allegation by his employer that any compensation paid for permanent disability, resulting from the compensable injury, should be "reduced by that proportion that the pre-existing physical handicap, disease, or lesion contributes to the results from the injury."[136] The Mississippi courts have made it clear that this apportionment of payments is only appropriate where the pre-existing condition actually caused pre-injury occupational disability.[137] Where the employee has enjoyed the ability to engage in full-time employment for a substantial time prior to the compensable injury, it is assumed that no pre-existing occupational disability existed.[138] Moreover, "the pre-existing condition asserted to be the basis for apportionment must be shown to bear upon the disability for which compensation is claimed".[139]

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foot, leg and eye. Second injury may be to "another member or organ." *Id.* The second injury category is apparently not limited to the listed members. *Id.*

[135] The second injury fund in Mississippi is funded by employers and carriers who are required to pay $300 into the fund for each compensable death claim they suffer, $500 if there are no dependents. *Id.* Once the fund has $350,000 in it, all employer contributions are suspended until the balance of the fund falls below $150,000. *Id.* A possible effect of the ADA, if it results in employing more persons who then require second injury fund payments, would be to deplete the fund more rapidly and thus require more employer contributions. However, the MWCC is designed to distribute this liability as widely as possible, and in any event, mere increase in workers' compensation costs is not a valid justification for failing to comply with the Act. *Id.*

[136] MISS. CODE ANN. § 71-3-7(c) (Supp. 1992). Apportionment does not affect compensation payable for temporary disability or medical expenses. *Id.* The burden of proof is on the employer who claims apportionment to establish it by sufficient evidence. *Id.*

[137] Stuart's, Inc. v. Brown, 543 So. 2d 644, 655-56 (Miss. 1989); *see also* Delta CMI v. Speck, 586 So. 2d 768, 773 (Miss. 1991) (holding that pre-existing conditions are not subject to apportionment). Brown does not specifically address apportionment in occupational disease or heart attack cases. *Brown*, 543 So. 2d at 655 n.13. In keeping with this, apportionment was allowed where a disabling heart attack was materially contributed to by pre-existing industrial disease. Mitchell Buick v. Cash, 592 So. 2d 978, 981 (Miss. 1991).

[138] *Brown*, 543 So. 2d at 656.

[139] DUNN, *supra* note 16, § 52 (Supp. 1990).

The clear import of the ADA is that this should not be altered, even if the injured employee required reasonable accommodation in order to avoid pre-existing occupational disability. It would clearly be illegal disparate treatment for an employer to single out such persons for lower pay or exclusion from fringe benefits solely because of disability.[140] Presumably the MWCA and the courts will not be allowed, under the ADA, to permit employers to do, in the workers' compensation arena, what they are prohibited from doing in any other arena.

III. CONCLUSION

The ADA will not resolve all of the problems disabled employees face, either in obtaining or retaining employment, or when they suffer compensable injuries while on the job. Nor will the ADA necessarily prevent an injured worker from suffering loss in the event the injury actually prevents him from continuing in his former employment. What it will do, hopefully, is eliminate from the worker's compensation context, as it will from employment relationships generally, arbitrary actions based on paternalism, myths, fears, or stereotypes concerning what people who have suffered disabling injuries can and cannot do in the wake of such injuries. To that extent, employees are clearly going to be more able to demand accountability from employers in connection with workers' compensation matters than they could in the absence of the ADA. Employers are going to have to focus on the reality of the individual worker's situation and not rely on often exclusionary assumptions in managing workers' compensation risks and charting post-injury relationships with injured workers.

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[140] 29 C.F.R. app. § 1630.5 (1992). A narrow exception to the ADA permits an employer to have uniformly applied health insurance plans that underwrite, classify or administer risks in ways based on or not inconsistent with state law. 42 U.S.C.A. § 12201(c) (West Supp. 1992). This is allowed even if that plan adversely affects a disabled employee, unless this is a subterfuge to avoid the purpose of the Act. *Id.*; *see also* 29 C.F.R. § 1630.16(f) (1992) (discussing health insurance exception under § 1630.16(f)). Also, the employer is probably shielded from unintended adverse effects of changes in benefit plans that are not done for the purpose of harming disabled persons. 29 C.F.R. app. § 1630.16 (1992).

DISABILITY LAW AND EMPLOYER POLICIES IN MISSISSIPPI

R. Pepper Crutcher, Jr.[1]

"If . . . a precise statement is impossible and yet legislation is necessary, the law must be expressed in wide terms . . . "[2] Such laws punish many who are guiltless, Aristotle wrote, but equity will acquit those captured in the overbroad net. Perhaps this was so among Aristotle's peers, but the habit of the 101st Congress was to cast the wide net conscious that it would capture many innocents and willing to discount that cost, often without weighing the cost against the benefit.[3]

The Americans with Disabilities Act (ADA) is such a law.[4] Noble in purpose, it imposes liability upon employers who violate ambiguous rules, and upon the unsophisticated small businessmen who fail to appreciate its subtle distinctions.[5] It has little in common with state workers' compensation law, yet employers must comply with both sets of rules when dealing with disabled applicants and employees. Your author's purpose is to address some questions which employers and their counsellors will encounter as they attempt to administer workplace policies in compliance with the ADA and Mississippi's Workers' Compensation Law.[6]

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[2] ARISTOTLE, ARISTOTLE'S RHETORIC AND POETICS 80 (W. Rhys Roberts & Ingram Bywater trans., Modern Library ed. 1954).

[3] For a modern appraisal of the efficiency of general versus specific rules, *see* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 20.3 (3rd ed. 1986).

[4] 42 U.S.C. § 12101 *et seq.* (Supp. II 1990). The ADA is a comprehensive civil rights law for the disabled. It forbids employment discrimination, requires reasonable accommodation of disabled applicants and employees, and requires public agencies and public accommodations to make their facilities and services accessible to the disabled public.

[5] For example, obesity within a normal human range is not a covered disability, unless it is caused by a covered disability or is regarded as disabling. As you deliver this correct opinion, your client will hear you say, "Fat people aren't protected, unless they are, or you think they are." The lawyer who gives this advice should expect hostile interrogation. Your author chuckled when first he read Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 Harv. L. Rev. 2035 (1987). It seems less laughable now. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, TECHNICAL ASSISTANCE MANUAL FOR THE AMERICANS WITH DISABILITY ACT II-10 (facial scar may

The beginning of wisdom is your recognition that Congress passed the ADA with little consideration for its impact on workers' compensation systems.[7] The two regulatory schemes have different goals. The ADA does not compel disability compensation; rather, it promotes employment of the disabled. Consequently, the two laws differ fundamentally in their definitions of disability. Under the Mississippi Workers' Compensation Law,[8] "'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings."[9] The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [the disabled] individual."[10] It deems disabled all who have a record of disability, and all who are regarded as disabled.[11] The ADA protects many who are

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be disabling).

[6] More precisely, this article examines the impact of ADA Title I, 42 U.S.C. §§ 12101-12117 (Supp. II 1990), on private sector employer disability policies. This article does not address the impact of ADA Title III, 42 U.S.C. §§ 12181-12189 (Supp. II 1990), nor does this article consider the possible impact of the recently enacted Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (February 5, 1993). Title III concerns the obligations of "places of public accommodation" and "commercial facilities" to make facilities and services accessible to the disabled public. The interplay between ADA Title I and Title III may be significant in some cases.

[7] The statute contains no reference to workers' compensation. The legislative history mentions workers' compensation only when noting that fear of increased compensation costs is an inadequate ground for rejecting an applicant. H.R. REP. NO. 101-485(III), 101st Cong., 2nd Sess., *reprinted in* 1990 U.S.C.C.A.N. 267, 453.

[8] MISS. CODE ANN. § 71-3-3(i) (Supp. 1992).

[9] *Id.*; *see* Stuart's, Inc. v. Brown, 543 So. 2d 649, 652-53 (Miss. 1989) (discussing what is meant by term "disability").

[10] 42 U.S.C. § 12102(2)(A) (Supp. II 1990).

[11] 29 C.F.R. § 1630.2(g) (1992).

ineligible for workers' compensation, offers no protection for many who suffer compensable, but minor, or temporary, job-related injuries,[12] and promotes only those disabled workers who can perform a job's "essential functions"[13] with "reasonable accommodation."[14] So, an outcome under one act may not control a claim under the other.[15] This understood, we turn to the workaday dilemmas which Congress has created.

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[12] *See* TECHNICAL ASSISTANCE MANUAL, *supra*, note 4, at ch. IX (giving guidance on ADA requirements as they relate to workers' compensation practices); 29 C.F.R. § 1630.2(j)(2) (1992), which excludes from the term "substantially limits" disabilities of minor severity, short duration, and little lingering affect. For examples of workers' compensation disability findings which should accord with the ADA, *see* Piper Industries, Inc. v. Herod, 560 So. 2d 732, 734-35 (Miss. 1990) (permanent partial disability from contact dermatitis; could not bear exposure to sulfur dioxide again); Smith v. Container Gen. Corp., 559 So. 2d 1019, 1022 (Miss. 1990) (falling on concrete floor due to hangover produced compensable injury); Brown & Root Const. Co. v. Duckworth, 475 So. 2d 813, 816 (Miss. 1985) (raising, then dashing worker's hopes of advancement produced compensable hysterical conversion reaction); Smith & Sanders v. Peery, 473 So. 2d 423, 426 (Miss. 1985) (stress of losing job is not compensable injury); Hardin's Bakeries v. Ranager, 64 So. 2d 705, 710 (Miss. 1953) (compensable injury consisted of disability caused by allergy to bakers' mittens). For examples of cases which should produce contrary results under the two statutes, *see* Walker Mfg. Co. v. Cantrell, 577 So. 2d 1243, 1248 (Miss. 1991) (no permanent disability shown when claimant had only applied for job with prior employer; no proof he was unemployable in that work); International Paper Co. v. Kelly, 562 So. 2d 1298, 1302-03 (Miss. 1990) (25% impairment shown, but post-accident earnings increase means no permanent partial disability); Robinson v. Packard Elec. Div. Gen. Motors Corp., 523 So. 2d 329, 331 (Miss. 1988) (little proof of disability required but it must be disability which limits earning ability); Fought v. Stuart C. Irby Co., 523 So. 2d 314, 317 (Miss. 1988) (mental injury unaccompanied by physical trauma must have been caused by something beyond employment norm to be compensable); Contract Trucking Co. v. May, 183 So. 2d 488, 489 (Miss. 1966) (ulcerative colitis bore no relation to work); Collums v. Caledonia Mfg. Co., 115 So. 2d 672, 673 (1959) (sickness from mouse in coke bottle bought from employer's vending machine is compensable). For examples of cases which could fall into ADA protection depending on their particular facts, *see* Marshall Durbin, Inc. v. Hall, 490 So. 2d 877, 881 (Miss. 1986) (total disability possible with little loss of function); Penrod Drilling Co. v. Etheridge, 487 So. 2d 1330, 1334 (Miss. 1986) (disabling pain is compensable without medical evidence of physical cause); Miller v. McRae's Inc., 444 So. 2d 368, 372 (Miss. 1984) (stress from false imprisonment by security guard not compensable); Reading & Bates, Inc. v. Whittington, 208 So. 2d 437, 439 (Miss. 1968) (drinking and driving, employee stopped to urinate and suffered compensable injury when he stepped in hole on roadside, breaking his leg).

[13] *See* 29 C.F.R. § 1630.2(n) (1991).

[14] *See* 29 C.F.R. § 1630.2(o) (1991).

[15] *See generally* Johnson v. United States, 576 F.2d 606, 611-13 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018 (1981); Annotation, *Applicability of Doctrine of*

I. USING INJURY RECORDS IN THE HIRING PROCESS

Formally, Mississippi law permits employers to fire at-will workers for filing workers' compensation claims.[16] But the ADA forbids employers to ask applicants about prior injuries or medical history before making a job offer, and it proscribes consideration of the applicant's impact on future workers' compensation insurance costs.[17] In short, the ADA appeared to leave businesses defenseless against high-risk workers and compensation frauds, since employers had been forbidden to exclude applicants with poor claims histories.

In July 1991, the EEOC opined in its Technical Assistance Manual that employers may nevertheless refuse to hire those who have filed fraudulent claims or who have falsified answers to lawful, post-offer questions about their prior injuries.[18] Proving that prior, unsuccessful claims were fraudulent is too difficult and expensive, but it is feasible and efficient to compare the applicant's statements about his prior claims with public records. Employers may do this by purchasing the information from one of the private compilers of such records. At least two now do business in Mississippi.

Administrative Res Judicata to Determination by Secretary of Health, Education, and Welfare That Claimant Is Not Entitled to Social Security Disability Benefits, 14 A.L.R. Fed. 776 (1973); 46 AM. JUR. 2d, *Judgments* §§ 417, 418, 421, 518 *et seq.* Generally, a party may plead inconsistently, even in the same action. But when the issues and parties are identical in successive disability actions, courts have frowned on cynical abuses of this rule. *See* CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1283 (1990). The problem here is that the issues may not be identical in ADA and compensation cases. *See id.*

[16] Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 877 (Miss. 1981). Although the court grounded its decision on the Mississippi Constitution's separation of powers provision, the result has been cast in doubt by subsequent cases. *See* Bobbitt v. The Orchard, Ltd., 603 So. 2d 356, 361 (Miss. 1992) ("this Court will be looking for a wiser and more humane alternative to the terminable at will rule in an employment contract"). The ADA expressly forbids retaliation against those who assert their ADA rights. 42 U.S.C.S. § 12203(a) (Supp. 1992).

[17] 42 U.S.C. § 12112(c) (Supp. II 1990); 29 C.F.R. § 1630.13 -.14 (1991); TECHNICAL ASSISTANCE MANUAL, *supra* note 4, at IX-1.

[18] TECHNICAL ASSISTANCE MANUAL, *supra* note 4, at IX-7.

Employers who use this information for this limited purpose take several risks. The most obvious is that the Clinton administration may disavow this policy. It is at least open to argument, since nothing in the statute expressly permits employers to withdraw job offers based on errant responses to post-offer medical questions. Even under current EEOC policy, employers may not discriminate by scrutinizing only these responses for falsehoods.[19] A Democratic Commission may conclude that exclusions for application falsehoods have a disparate impact on applicants with compensation claim histories. Or, courts may impose a heavy burden upon employers to prove that the applicant intended to falsify his response.

The marketability of compensation claims information assumes that the ADA permits disclosure. This is a fair inference.[20] The ADA expressly permits three types of medical exams and inquiries: the employee entrance examination;[21] necessary, job-related examinations of employees;[22] and voluntary wellness program examinations.[23] In each case, employers must treat the medical information obtained as a confidential medical record. In all three regulated classes of examinations, the confidentiality duty extends to "[i]nformation obtained . . . regarding the medical condition or history"[24] of the examination subject, and the ADA expressly approves only a few, enumerated disclosures. The ADA says nothing in particular about the confidentiality of workers' compensation injury reports or claim records, nor anything about the transfer of information from public files. Because the Act neither forbids nor approves disclosure of injury reports and claims information, and since Congress must have known the workings of state compensation systems, it appears that Congress did not intend to regulate disclosure of such records. The EEOC appears to have assumed as much in its Interpretive Guidance, which explains that employers may release employee examination information to workers' compensation agencies.[25]

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[19] E.E.O.C. Decision No. 71-2089, 1971 WL 3941, at 4 (E.E.O.C. May 19, 1971) (finding false arrest record information as impermissible ground for denying employment).

[20] Mississippi law does not bar disclosure. The Mississippi Workers' Compensation Law provides that "noncontroverted case medical reports, rehabilitation counselor reports and psychological reports of the commission, insofar as they refer to accidents, injuries and settlements, shall not be open to the public under the Mississippi Public Records Act of 1983, but only to the parties satisfying the commission of their interest in such records and the right to inspect them." MISS. CODE. ANN. § 71-3-66 (1972 & 1989). Commission Rule 15 prescribes disclosure procedures. Miss. Workers' Comp. Law, Comm'n Rule 15 (1984). But the fact and nature of an injury can be gleaned from a Mississippi Workers' Compensation Commission Form B-3 (Revised 1982), which is not a "medical report" (Miss. Workers' Comp. Comm'n Form B-27 (Revised 1982)) or "preliminary medical report" (Miss. Workers' Comp. Comm'n Form B-9 (Rev. 1982)).

[21] 42 U.S.C. § 12112(c)(3) (Supp. II 1990); 29 C.F.R. § 1630.14(b) (1992).

[22] 42 U.S.C. § 12112(c)(4)(A) (Supp. II 1990); 29 C.F.R. § 1630.14(c) (1992).

[23] 42 U.S.C. § 12112(c)(4)(B) (Supp. II 1990); 29 C.F.R. § 1630.14(d) (1992).

[24] 42 U.S.C. § 12112(c)(4)(C) (Supp. II 1990).

Suppose, however, that an employer wishes to disclose employee medical records directly to another employer, or to a private information bureau. May the employee waive the ADA's confidentiality requirement? May she do so as part of the hiring process? Or is the ADA's rule, like the federal minimum wage, immune to private variance? The ADA's text lends some support to the pro-waiver view. The Act expressly requires only that information gathered in employee medical examinations be "treated as a confidential medical record . . . ."[26] One reasonable inference is that Congress, intended to borrow the states' pre-existing privilege rules. If this is so, it is reasonable to infer that Congress borrowed waiver rules as part of the package.[27] The contrary view has some support in the text, by negative implication: Congress having enumerated certain approved disclosures of confidential information, barred all others by silence. The better argument against waiver is that sophisticated employers will defeat the confidentiality requirement by prospective waivers, and that generalized, prospective waivers permit use of medical exam information for purposes inconsistent with the ADA.[28]

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[25] *See* 29 C.F.R. app. § 1630.14(b) (1992). "[E]mployers . . . may submit information to state workers' compensation offices or second injury funds in accordance with state workers' compensation laws without violating this part." *Id.*

[26] 42 U.S.C. § 12112(c)(3)(B) (1990).

[27] *See* Edwards v. Ellis, 478 So. 2d 282, 286 (Miss. 1985) (upholding contractual waiver of medical privilege). *See generally* MISS. CODE ANN. § 13-1-21 (Supp. 1992); MISS. R. EVID. 503.

Medical information gathered through one of the three regulated classes of examinations may not be stored in personnel files.[29] This requirement took effect July 26, 1992, for employers of twenty-five or more. What of medical records placed in personnel files before that date? Must an employer sanitize its records retroactively? And if so, how far back? Neither Congress nor the EEOC has addressed this question.

The requirement of separate medical files aims to discourage employment decisions based on disability information. The employer's risk is that knowledge of the disability will be attributed to decision makers more readily if the employee's personnel and medical records are combined. Thus, while the ADA probably does not require retroactive segregation of such records,[30] employers should consider doing so if continued combination of the records might help a claimant prove her case.

II. Injuries During the Interview

An employer may not ask an applicant "How's your back?", but may require an applicant to demonstrate that he can perform an essential job function. What obligations does an employer have to an applicant who injures himself during such a demonstration?

Workers' compensation is the exclusive remedy for covered injuries.[31] The interview injury will fall within the compensation system only if the applicant is an "employee."[32] This is unlikely, at least before the employer makes the job offer. Section 71-3-3(d) of the Mississippi Code defines employee as "any person . . . in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied . . . ." Our court has called proof of a contract of hire "very essential."[33]

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[28] *See* 29 C.F.R. § 1630.14(b)(2), (c)(2), (d)(2) (1992).

[29] 29 C.F.R. § 1630.14(b)(1) (1992). It belongs in separate, confidential medical records files. *Id.*

[30] *See* 29 C.F.R. § 1630.14(d) (1992). The confidentiality obligation follows collection of information through voluntary medical examinations and histories. *Id.* Before July 26, 1992, there were no regulated examinations.

[31] MISS. CODE ANN. § 71-3-9 (1972).

[32] *Id.*

III. DISCHARGES BASED ON "DIRECT THREAT"

The ADA permits an employer to condition employment on a requirement that an employee shall not pose a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation."[34] This is called the "direct threat" defense. An employer may first learn that an employee poses a "direct threat" after he suffers a workplace injury, especially if the employer has failed during the hiring process to verify statements about prior injuries. If the employer finds after the injury that the employee falsified his post-offer medical questionnaire, he has two remedies: (1) discipline or fire the employee for falsifying employment information;[35] or (2) transfer or remove the employee because he poses a "direct threat." In either event, the employer will find it difficult to defeat the ensuing compensation claim.[36] This is no accident. Congress intended to forbid employers to deny employment to those in high risk categories unless medical evidence demonstrates that the individual disabled worker poses a serious, unavoidable risk to himself or others. In other words, Congress desired that employers and their insurers bear the financial burden of disability payments in order to make taxpayers of the many who are disabled.

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[33] Sullivan v. Heirs of Sullivan, 192 So. 2d 277, 279 (Miss. 1966). *See also* Walls v. North Miss. Medical Ctr, 568 So. 2d 712, 718 (Miss. 1990) (holding student nurse apprentice employee because she rendered patient services); Index Drilling Co. v. Williams, 137 So. 2d 525, 529-30 (Miss. 1962) (finding no tort immunity because no contract for hire was entered).

[34] 29 C.F.R. § 1630.2(r) (1992); *see also* 42 U.S.C. § 12111(3) (1990). This assessment of direct threat must be based on an "individualized assessment of the individual's present ability to safely perform the essential functions of the job," taking into account a "reasonable medical judgment" based on "the most current medical knowledge" and "the best available objective evidence." 29 C.F.R. § 1630.2(r) (1992).

[35] See discussion *supra* Part I; *see generally* Gregory G. Sarno, Annotation, *Liability for Retaliation Against At-Will Employee for Public Complaints or Efforts Relating to Health or Safety*, 75 A.L.R. 4th 13 (1990).

[36] *See* Emerson Elec. Co. v. McLarty, 487 So. 2d 228, 231 (Miss. 1986) (concealing earlier injury no basis for denying later claim because first injury did not cause second injury).

IV. SAFETY STANDARD COMPLIANCE

The ADA expressly permits employers to comply with countervailing federal drug testing and fitness regulations, such as D.O.T. commercial motor vehicle operator licensing and medical qualification standards.[37] State standards do not enjoy the same status.

In the 1992 regular session, the Mississippi Legislature added a new provision to the Workers' Compensation Law which directs the Commissioner of Insurance to "promulgate such rules and regulations as to require each insurer to establish a safety program for the health and benefit of the employees of the insured employer."[38] "Such safety program shall require that all insured employers implement a written policy for drug and alcohol testing in accordance with Section 71-7-1 et seq . . . ."[39] Policies inconsistent with the new chapter are void.[40]

On its face, section 71-7-27 of the Mississippi Code permits private sector employers to opt into the statute's drug testing rules in exchange for qualified immunity from suits based on actions taken in compliance with the law, but employers are free to choose.[41] The compensation law amendment adopts the drug testing statute as part of a mandatory compensation insurance program. That may prove incompatible with the ADA.

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[37] *See e.g.* 42 U.S.C. § 12114(c)(5)(C), 12114(e) (Supp. II 1990) . For present purposes, we will ignore potential conflicts between OSHA standards and the ADA. The report of the House Committee on Education and Labor opines that certain OSHA health monitoring standards are immune to attack under the ADA, but the endorsement is a narrow one - "It is the Committee's intention that these OSHA standards are valid under this section." H.R. REP. NO. 101-485(II), 101st Cong., 2nd Sess., *reprinted in* 1990 U.S.C.C.A.N. 303, 357. Note, however, that OSHA compels employers to grant employees and union representatives access to employee medical records. 29 C.F.R. § 1910.20 (1992). It is not clear that Congress meant to immunize compliance with this standard. Your author prefers that assumption to the unconscionable alternative.

[38] MISS. CODE ANN. § 71-3-121 (Supp. 1992).

[39] *Id.*

[40] MISS. CODE ANN. § 71-3-77(1) (Supp. 1992).

[41] MISS. CODE ANN. § 71-7-27 (Supp. 1992).

The ADA's definition alone controls whether a substance abuse test is a regulated "medical examination." The ADA excludes testing to determine illegal drug use from its definition of "medical examination,"[42] thus exempting, for example, D.O.T. drug test procedures from frontal attack. But the ADA has no explicit exemption for alcohol tests. The Mississippi drug testing law originally included alcohol in its definition of "drug." Beverage industry lobbyists objected, and the bill was amended to insert "drug and alcohol" everywhere the broader term "drug" had appeared.[43]

While the ADA only exempts testing to determine the use of *illegal* drugs, the Mississippi law permits a "drug and alcohol test"[44] based on a "drug" definition which "means an illegal drug, or a prescription or nonprescription medication."[45] A capricious test to determine ingestion of vodka may violate the ADA. A test to determine ingestion of the AIDS drug AZT almost always will. Yet the AZT test literally seems permissible under Mississippi's law. And the law's confidentiality provision apparently allows employers to fire employees who refuse to execute disclosure waivers.[46] Moreover, Section 71-7-13 (1) of the Mississippi Code - providing that a positive test result will not confer disability protection - is misleading, since Mississippi lacks authority to immunize its employers from the ADA.

The Insurance Commissioner had not published his regulations at deadline, but your author had seen an insurer-mandated safety program based upon Section 71-3-121 of the Mississippi Code. It obligates the insured employer to monitor employee drug prescriptions brought to the work site. In some cases, this may prove to be "job related and consistent with business necessity."[47] In other cases, it may provide the sole basis for a successful disability discrimination claim, since the employer might have had no other knowledge of the disability.

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[42] 29 C.F.R. § 1630.16(c) (1992).

[43] *See, e.g.*, MISS. CODE ANN. § 71-7-27 (Supp. 1992).

[44] MISS. CODE ANN. § 71-7-1(d) (Supp. 1992).

[45] MISS. CODE ANN. § 71-7-1(b) (Supp. 1992).

[46] MISS. CODE ANN. § 71-7-15(3), (5) (Supp. 1992).

[47] 42 U.S.C. § 12112(d)(4)(A) (Supp. II 1990).

The Mississippi Legislature can amend our statutes to comport with the ADA. These changes should accomplish the same goals:

1. Uncouple the compensation law (section 71-3-121 of the Mississippi Code from the drug testing law (section 71-3-121 of the Mississippi Code). Require only that employers subject to Section 71-3-121 of the Mississippi Code address drug testing in their written safety programs.

2. Amend the compensation law to bar disability claims by employees whose intoxication contributes to an injury. Establish a presumption of causation based on a positive urinalysis result obtained under NIDA guidelines.[48]

V. EMPLOYER LIABILITY FOR NEGLIGENT ACCOMMODATION

In passing the ADA, Congress has created a statutory duty to accommodate qualified individuals with disabilities. Might an employer be held liable for providing a "reasonable accommodation" which is negligent in the tort sense? The answer appears to be yes, but workers' compensation will be the employee's exclusive remedy.

The question is most likely to arise as employers attempt to reinstate workers returning from disability leave. Assuming that a vacancy exists, the employer must make reasonable accommodations which will enable the employee to perform the job's essential functions. In ADA parlance, a "reasonable accommodation" might include "modifications or adjustments to the work environment, or to the manner or circumstances under which the position . . . is customarily performed," or

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[48] *See, e.g.*, ALA. CODE § 25-5-51 (Supp. 1992); LA. REV. STAT. ANN. § 23:1081 (West Supp. 1992). During the 1993 regular session, the House and Senate considered bills (H.B. No. 1365 & S.B. No. 2633) amending § 71-3-121 of the Mississippi Code to establish criteria for drug and alcohol testing under workers' compensation law. Both bills died in committee. The House also considered H.B. No. 412, amending § 71-3-7 of the Mississippi Code, to deny workers' compensation benefits to injured employees who test positive for illegal drugs or alcohol use. This bill also died in committee.

"acquisition or modifications of equipment or devices."[49] The reasonableness relates to the effectiveness of the accommodation in aiding the employee to overcome her disability, balanced against the hardship to the employer. But an accommodation which is reasonable in that sense may be negligent in the common law sense, especially if it is devised without expert advice. In Mississippi, employees are due workers' compensation for injuries suffered due to employer provision of first aid.[50] By analogy, workers' compensation should be the exclusive remedy for negligent accommodation claims.

VI. The Contradicting Claims Dilemma

Some questions which trouble employers will haunt claimants' counsel as well. Consider, for example, the injured worker who has sought compensation for permanent, severe disability, but who wants to return to work. His lawyer's compensation pleading may support the employer's ADA direct threat defense.[51] Lawyers proceeding along both tracks should consider explicit, written explanations to their clients of the possible consequences.[52]

This is small comfort for employers, who face a similar problem. An employer which disputes its employee's disability in order to procure a favorable compensation settlement will find it hard to oppose his reinstatement on a direct threat theory.[53] On the other hand, resisting reinstatement may establish the claimant's compensation case.[54] Although it has poetic appeal, taking an employee at his pleading concerning his severe disability probably won't play well in court.[55] When reinstating disabled workers, employers should anticipate this dilemma and take a consistent position.[56]

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[49] 29 C.F.R. § 1630.2(0) (1992).

[50] *See* Quitman Knitting Mill v. Smith, 540 So. 2d 623, 628 (Miss. 1989) (compensation due for essential tremors caused by combination of congenital condition and employer's first-aid aspirin).

[51] *See, e.g.*, Fishel v. American Sec. Life Ins. Co., 835 F.2d 613, 617 (5th Cir. 1988) (wrongful death pleading admissible to show that claimant was not employee); Central Elec. & Mach. Co. v. Shelton, 220 So. 2d 320, 324 (Miss. 1969) (group insurance application admissible in compensation case); Parker v. United Gas Corp., 127 So. 2d 438, 439 (Miss. 1961) (claimant admitted to disability insurer that claim was not compensable under workers' compensation law).

[52] *See* MISS. RULES OF PROFESSIONAL CONDUCT 1.4(b) (1987) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

[53] *See* Sawyer v. Head, 510 So. 2d 472, 476 (1987) (nothing wrong with filing tort and compensation claims when employer denies both).

VII. THE CLAIMANT'S RETURN

Handling reinstatement disputes concurrently with compensation claims is tricky, but employers are more fearful of the returning worker's risk of re-injury. As noted in Section III, the ADA forbids employers to deny reinstatement based on generalized assumptions about this risk. An employer concerned about the risk must gather accurate, objective evidence and medical opinion, evaluate reasonable accommodations which might reduce or eliminate the risk, and deny reinstatement only as a last resort. The probable result is that many workers with temporary or partial disabilities will return and risk permanent, total disability, sometimes long after their skills have diminished and their jobs have been filled. Must the employer go through this process with every disabled worker who wants to return?

Employers have adapted to other civil rights laws by instituting written, neutral policies and following them consistently. One infamous example is the no-fault absence rule, under which employees lose their jobs upon accumulation of a fixed number of "points." Such systems produce many inequitable results, but they assure the race and sex neutrality which the law demands. Some employers have taken the same approach to disability leave. A typical policy declares that all who are inactive for a period of 180 days are dropped from the payroll. The reason for the inactivity is irrelevant. The policy facially treats the disabled employee and the indecisive employee alike. Employers adopt this policy because they do not wish to be accused of timing an employee's discharge in order to gain leverage in settling his compensation case. Fixing this date in advance of any injury avoids that claim. But will it play under the ADA?

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[54] Seal v. Industrial Elec., Inc., 395 F.2d 214, 215 (5th Cir. 1968) (employer subject to compensation claim after defending tort suit successfully on exclusive remedy ground).

[55] *See* Roberson v. Rebstock Drilling Co., 749 F.2d 1182 (5th Cir. 1985) Roberson recovered from a finger injury and returned to work. *Id.* at 1182. Unable to settle his small claim for the desired sum, he sued for $500,000, claiming severe, permanent disability. *Id.* at 1183. His employer told him that he could have it either way, but not both. *Id.* He stuck to the complaint's story and was fired. *Id.* He then settled his finger injury claim for about 5% of his demand and sued for retaliatory discharge under Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. 1981). *Roberson*, 749 F.2d at 1183. The court of appeals reversed the lower court and upheld his right to do so. *Id.* at 1184.

[56] Bad faith claims lurk in the shadows of this discussion. *See* Butler v. Nationwide Mut. Ins. Co., 712 F. Supp 528, 530 (S.D. Miss. 1989) (cannot file bad faith action until after MWCC final order); Leathers v. Aetna Casualty & Sur. Co., 500 So. 2d 451, 453 (Miss. 1986) (carrier not protected from bad faith claim by § 71-3-9 of the Mississippi Code). *See generally* Michael A. Rosenhouse, Annotation, *Tort Liability of Worker's Compensation Insurer for Wrongful Delay or Refusal to Make Payments Due*, 8 A.L.R. 4th 902 (1981).

The ADA should not require employers to retain disabled workers perpetually,[57] but it does demand both non-discrimination and reasonable accommodation. Claimants can be expected to argue that extending leave periods ad hoc is a reasonable accommodation. But fixed-term leave policies should survive ADA claims, assuming that they were not adopted with intent to discriminate. The EEOC's regulation forbids employers to discriminate against disabled workers in the application of leave policies,[58] but "[l]eave policies or benefit plans that are uniformly applied do not violate [the Act] simply because they do not address the special needs of every individual with a disability."[59] Even a sick leave reduction is permitted, says the EEOC, if it is adopted for legitimate reasons, and if so adopted, it may not be attacked based on its disparate impact.[60] Courts should not force employers to demonstrate that ad hoc leave extensions would impose undue hardship.

Nevertheless, this policy entails some risk, and may need to be modified in extreme situations. The Technical Assistance Manual cites "[f]lexible leave policies" as one form of reasonable accommodation, saying "An employer is not required to provide additional paid leave as an accommodation, but should consider allowing use of accrued leave, advanced leave, or leave without pay, where this will not cause an undue hardship."[61]

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[57] *See generally* decisions under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), such as Cohen v. Dept. of Army, 46 M.S.P.R. 369 (1990).

[58] 29 C.F.R. § 1630.4(e) (1992).

[59] 29 C.F.R. § 1630 (1992) (EEOC Interpretive Guidance to 29 C.F.R. § 1630.5 (1992)).

[60] *Id.*

Some employers have adapted their fixed leave policies to the ADA by adopting a tickler system to assure that each employee whose leave is about to expire receives a written invitation to return to work. This invitation explains the employer's medical evaluation and accommodation process and asks the employee to respond if he wants to pursue his options. In short, it unequivocally explains that the employer is willing to fulfill its ADA responsibilities.[62]

A complimentary policy designed to detect "direct threat" conditions is the pre-reinstatement medical evaluation. This is not the traditional "medical release" familiar to compensation practitioners. The lawful motive for such a process is the desire to assure that a returning worker be matched to her work environment in a way which permits her to work productively, but with a minimum risk of re-injury. The medical examination should be one of several parts of this evaluation. Most critically, the employer should consult the disabled employee. The employee may know best what she needs in order to do the job safely. However, in some cases, the examination may reveal that changing jobs is the only solution. Physicians who perform such examinations must have accurate information[63] and they must appreciate the ADA's definitions of "essential functions," "reasonable accommodation," and "direct threat."[64]

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[61] TECHNICAL ASSISTANCE MANUAL, *supra* note 4, at III-23. Please keep in mind that employers' options regarding unpaid leave for medical reasons have been restrained by the recent passage of The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (February 5, 1993).

[62] Only those employers who are willing to be bound by such statements should issue them. *See* Bobbitt v. The Orchard, Ltd., 603 So. 2d 356, 361 (Miss. 1992) (court held nursing home bound by its disciplinary policy as expressed in employee handbook).

[63] Your author prefers a written ergonomic job description paired with a videotape of the job being performed.

Employers accustomed to reinstating workers to prior positions based on medical releases sometimes have accommodated lingering disability by creating "light duty" work. The ADA permits this, but may punish employers who travel this route. An employer need not create a new job for the returning worker, though the employer must consider assigning her to a vacant position which she can handle. Further, an employer need not reinstate an employee who cannot perform, with reasonable accommodation, the essential functions of the vacant position. But the employer who creates a new job for one employee may have to explain the non-discriminatory basis for refusing to do the same in a subsequent case. And an employer who makes light duty work by removing a taxing but essential function may have undercut his ability ever to show that the function is, in fact, essential.[65] Some employers have addressed this problem by creating a subset of light duty jobs within a classification. A position description may say, for example, that Yard Driver B is a temporary position limited to 90 days' occupancy by any one person, and that disabled drivers and warehousemen will receive first consideration for vacant YDB positions, followed by driver trainees. Courts should approve such sub-classifications as good faith attempts to institutionalize on-the-job rehabilitation.[66]

One obstacle to that approach is the conflict between the EEOC and the National Labor Relations Board over employers' duty to bargain with employees' unions before changing wages, hours, or working conditions.[67] The NLRB declined the EEOC's request to develop a joint policy statement.[68] Unless a union waives its right to bargain over disability accommodations, its members' employer may find itself damned if it does and damned if it does not make the reasonable accommodation. The requested accommodation may violate seniority provisions of the parties' labor agreement, for example, or may alter job content or cause some to perceive that the disabled worker is receiving undeserved preferential treatment. One of the EEOC's own examples (suitably modified) shows how this might happen. An injured shipping dock worker may be able to continue working with a hand truck or dolly. So equipped, he works slower and with less effort. His co-workers would like the same equipment, but space and traffic will permit only one. The EEOC may view the accommodation as an undue hardship if it shifts too much work to coworkers, but the EEOC will not permit the employer merely to accede to the co-workers' complaints.[69] In union-employer relations, those complaints are known as grievances.

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[64] *See* 29 C.F.R. §§ 1630.2(n), (o) & (r) (1992), respectively.

[65] Employers will find it difficult to argue that a function is essential if some in the classification do not do it. *See* 29 C.F.R. § 1630.2(n) (1992); 29 C.F.R. app. § 1630 (1992) (EEOC interpretative guidance to 29 C.F.R. § 1630 (1992) which "focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential").

[66] The opposing argument is that such sub-classifications segregate disabled workers from others in violation of 42 U.S.C.S. § 12112(b)(1) (Law Co-op. Supp. 1992). But segregation did not occur in the cited example, and this is not segregation which "adversely affects the opportunities or status of such . . . employee because of the disability . . . ." 42 U.S.C.S. § 12112(b)(1) (Law. Co-op. Supp. 1992).

NLRB Counsel Jerry Hunter has made these points about the NLRA/ADA interface:

> [W]here changes in working conditions are *mandated* by changes in law, an employer does not violate [the NLRA] by making such changes. But, where the change in law leaves the employer with some discretion with regard to compliance, the employer violates [the NLRA] by unilaterally changing terms and conditions to bring itself into compliance.
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> . . .
>
> A party would have no right under the NLRA to insist on contract terms that are, on their face, violations of the ADA.
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> . . .

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[67] *See* NLRB v. Katz, 369 U.S. 736, 743 (1962) (National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1988), requires unionized employers to refrain from changing employment terms unilaterally).

[68] The formal reason advanced was the Board's lack of authority to issue advisory opinions. The Board's General Counsel issued a memorandum to NLRB regional directors explaining his view of the tension between the ADA and NLRA. *See* current comment, 4 Lab. L. Rep. (CCH) ¶ 9465.

[69] TECHNICAL ASSISTANCE MANUAL, *supra* note 4, at III-10, 15.

> [A]n employer that arranges a reasonable accommodation with an employee which would change working conditions without negotiating with an affected union may be liable [under the NLRA] for "direct dealing" with the employee.[70]

On many other issues, the General Counsel has waffled. For example, he forecasts that the Board will resolve competing ADA confidentiality concerns and NLRA information disclosure obligations initially by directing "the parties to bargain over means to accommodate both interests."[71]

Employers cannot afford to find themselves without the power to confidentially and unilaterally affect a reasonable accommodation. It is no consolation that the disabled employee may also sue the union. The law caps defendants' damages based on the number of their employees.[72] Local unions typically have few, if any, employees. Therefore, in the same case, the union may face a judgment of $50,000 and the employer a judgment of $300,000. Knowing this, a savvy union representative may demand an unrelated concession in exchange for approving the proposed accommodation. The solution is a clear, unmistakable, written waiver of the union's right to veto reasonable accommodations.

A worker who returned to the job with an accommodation which is reasonable in both the ADA and tort senses may yet file a successful compensation claim by alleging that his maximum recovery diagnosis was incorrect.[73] In addition, an employer cannot assure that an employee will use the accommodation provided or follow medical advice.[74] It is not clear whether an employer may safely discipline an employee who injures himself by failing to use the accommodation provided.

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[70] Current Comment, 4 Lab. L. Rep. (CCH) ¶ 9465 (footnotes omitted).

[71] *Id.*

[72] *See* 42 U.S.C.A. § 1981A(b) (West Supp. 1992); *see also* EEOC Enforcement Guidance No. 915.002, "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991," (July 14, 1992), reprinted in 2 Empl. Prac. Guide (CCH) New Developments ¶ 5360.

[73] *See* Davis v. Scotch Plywood Co., 505 So. 2d 1192, 1196-97 (Miss. 1987) (medical evidence of disability overcomes prior medical evidence of full recovery; new compensation due without subsequent injury).

[74] *See* Shivers v. Biloxi-Gulfport Daily Herald, 110 So. 2d 359, 362 (Miss. 1959) (injury compensable even though produced by over exertion in violation of medical advice). In mental disability cases, an employer may be liable for compensation when the employee injures himself intentionally. *See* Kelly Bros. Contrac-

What of the employee who injures a third party after his return?[75] At least a few in Congress thought about this problem when considering the ADA. The minority report of House Energy and Commerce Committee recounts with concern the disability suit filed by an unstable Louisville, Kentucky worker. He sued his employer under Kentucky's disability law, and the employer settled by reinstating him despite his history of mental problems. He then shot seven co-workers. Congressman Dannemeyer attempted to amend the ADA to allow employers great latitude to exclude such employees from the workplace. The House rejected his amendment.[76] This leaves employers with the responsibility to balance, at their peril, the exposure of reinstating an unstable employee against the exposure to his lawsuit, also weighing the cost of mental evaluations and reasonable accommodations.

VIII. THINKING ABOUT LITIGATION[77]

A North Mississippi employer, hearing about the ADA for the first time at a trade association meeting, asked your author, "Do I have to treat every disability case like I'm going to be sued?" The answer, of course, was, "Only if you want to be prepared when you are sued." The same goes for claimants.

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tors, Inc. v. Windham, 410 So. 2d 1322, 1324-25 (Miss. 1982) (compensable injury produced mental disturbance, which produced fatal ingestion of drugs and alcohol).

[75] Note that, under our law, his receipt of compensation for the accidental injury to him is not evidence that he was engaged in the course and scope of his employment for vicarious liability purposes. Smith v. Anderson-Tully Co., 608 F. Supp. 1143, 1146 (S.D. Miss. 1985), *aff'd*, 846 F.2d 751 (5th Cir. 1988).

[76] Americans with Disability Act of 1990, Pub. L. No. 101-336, 1990 U.S.C.C.A.N. (104 Stat. 327) 267.

[77] This section omits forum selection, pre-emption, and pendent claims issues which counsellors should consider before filing suit on behalf of a disabled claimant.

A. *Limitations and Tolling*

An ADA claimant begins the litigation process by filing his administrative charge with the EEOC within 180 days of the alleged violation. He must sue within ninety days after the EEOC notifies him that it has concluded its investigation of his charge. These rules are familiar to employment law practitioners because they have been in force for a quarter century.[78] Generally speaking, the rules governing tolling of the limitations periods should be similar. Claimants' counsel should not expect a compensation claim to toll an ADA filing period, since the statutes are fundamentally different.[79] But compensation practitioners may have a familiar tolling argument for use in ADA proceedings.

Our court will toll the filing period for compensation claims when the claimant's mental incompetence - inability to "manage the ordinary affairs of life" - causes the delay.[80] Courts will be forced to adopt some similar standard in ADA cases because the new class of claimants includes many who are mentally disabled.[81]

B. *Settlement*

Employers suspect that reinstatement disputes will produce the bulk of ADA claims. Employers' counsel engaged in

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[78] Congress adopted the remedies and procedures of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §§ 2000e-5 (Lawyer's Co-op. Supp. 1992), then amended Title VII sixteen months later, passing the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C.S. § 2000e-5 (1972 & Supp. 1992)), to give Title VII and ADA claimants jury trials and legal relief. *See, e.g.* 42 U.S.C.S. § 1981A (Law. Co-op. Supp. 1992).

[79] *See* Wilson v. Zapata Off-Shore Co., 939 F.2d 260, 267-68 (5th Cir. 1991) (Longshore and Harbor Workers' Compensation Act claim does not toll Jones Act filing period for sex harassment injury claim.)

[80] *See* Shippers Express v. Chapman, 364 So. 2d 1097, 1102 (Miss. 1978) (refusing to toll statute where incompetence not proven credibly).

[81] Equitable tolling applies in Title VII cases. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 349 n.3 (1983); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982). In Kien v. United States, 749 F. Supp., 286, 289-92 (D.D.C. 1990), *aff'd*, 951 F.2d 1323 (D.C. Cir. 1992), the court rejected a request to toll the Rehabilitation Act filing period based on "post-traumatic stress disorder with major depressive episodes," because the claimant was not *non compos mentis*.

ADA settlement discussions will want to know whether they can credit against any back pay due the workers' compensation payments made after the alleged discrimination. Federal law will answer this question. District courts enjoy broad discretion in determining whether or not to deduct unemployment compensation and disability payments from back pay due in civil rights actions.[82] The compensation carrier's right to recover its payments from the ADA claim's proceeds argues against deduction.

Expressing the problem another way, will an ADA settlement reduce or eliminate future compensation payments? Mississippi law will control this question.[83] Mississippi law credits tort damage payments against compensation due, so payments made in settlement of ADA claims should receive the same treatment.[84]

C. Subrogation Right of Compensation Carrier in ADA Recovery

This is one of the more interesting questions which arises on the fault line where ADA and compensation remedies meet. The usual rule regarding tort claims, which Mississippi follows, is that an employer's insurer cannot enforce a claimant's release of tort claims against third parties in a compensation settlement.[85] However, the carrier may recover from the proceeds of such claims the compensation which it paid.[86] Does the compensation insurer have the same right in the recovery of an ADA judgment? What if the insurer is a self-insured employer who is also the ADA defendant?

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[82] Johnson v. Harris County Flood Dist., 869 F.2d 1565, 1578-79 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); Guthrie v. J. C. Penney Co., 803 F.2d 202, 209-10 (5th Cir. 1986).

[83] Our compensation law works independently of other states', but should not permit double recovery. *See* Harrison Co. v. Norton, 146 So. 2d 327, 333 (Miss. 1962) (award under other state's compensation statute does not bar, but does offset, award under ours). *See also* Thomas v. Washington Gas Light Co., 448 U.S. 261, 280 (1980) (suggesting that successive awards from multiple states protects worker's interest of just compensation). That is, employers receive credit under our law for payments made for the same injury under other states' laws. But the same is not true when the employer pays small amounts under its own sick leave policy. Pet, Inc. v. Roberson, 329 So. 2d 516, 517 (Miss. 1976). An employer will receive credit against compensation due for weeks when its policies pay the claimant at least the compensation he was due. But the employer gets no credit against future compensation for overpayment. South Cent. Bell Tel. Co. v. Aden, 474 So. 2d 584, 596 (Miss. 1985).

[84] *See* Sawyer v. Head, 510 So. 2d 472, 480 (Miss. 1987) (tort payment to plaintiff must be credited against amount owed in MWCC case). *But see* Bowen v. Magic Mart, 441 So. 2d 548, 550 (Miss. 1983) (employer gets no credit for payments claimant received from his separate insurer).

The carrier in subrogation cases pays to alleviate the damages which the claimant suffers because of another's wrong. The damages which are reimbursed include lost wages. Indeed, the "disability" for compensation purposes is the loss of wage earning capacity. The same relationship may be found in some ADA cases. The compensation carrier may pay a portion of lost wages when a disabled employee is damaged, i.e. unable to earn wages, because of another's unlawful act.[87] Courts should recognize the insurer's subrogation right simply to prevent double recovery.

D. *Expect the Unexpected*

In controverted compensation cases, the employer bears the burden to show employability after the claimant shows some evidence of lost earning capacity.[88] The law generally assumes that citizens act lawfully.[89] Therefore, employers should be assumed, absent evidence to the contrary, to hire qualified disabled individuals without discrimination. Should the compensation commission consider this when assessing loss of future wage-earning capacity? Should judges and jurors consider this when considering claims for future lost wages? Defense counsel will argue they should.

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[85] MISS. CODE ANN. § 71-3-71 (1972); Hague v. Liberty Mut. Ins. Co., 504 F.2d 364, 368 (5th Cir. 1974) (invalidating employer/carrier's release which waived employee's rights against third parties). *See also* Cossitt v. Nationwide Mut. Ins. Co., 551 So. 2d 879, 887 (Miss. 1991) (compensation insurer has no right in employee's claim under employer's uninsured motorist policy).

[86] Richardson v. United States Fidelity & Guar. Co., 102 So. 2d 368, 371 (Miss. 1958) (after subtraction of collection costs, recovery from third party wrongdoer is used to discharge carrier's liability, present and future).

[87] The wrongful act also may include failure to offer assisting devices which the carrier provided as medically necessary items.

[88] The claimant must show that he sought other work. *See* Pontotoc Wire Prod. Co. v. Ferguson, 384 So. 2d 601, 604 (Miss. 1980) (holding that claimant must prove "reasonable efforts to obtain employment"); Sardis Luggage Co. v. Wilson, 374 So. 2d 826, 829 (Miss. 1979) (reversing finding of permanent partial disability where claimant fails to prove she sought employment); Thompson v. Wells-LaMont Corp., 362 So. 2d 638, 641 (Miss. 1978) (holding that burden of proof rests on claimant to prove loss of wage earnings ability by proving unsuccessful attempts to secure employment).

[89] This is an assumption, not a presumption. *See* CHARLES A. WRIGHT & KEN-

Employers also should expect unpleasant surprises in litigation. Since the potential for recovery is greater in ADA actions than in compensation cases, ADA cases will bear more expert witness expense. Novel disability theories may appear for the first time in experts' depositions or trial testimony. Such testimony and the resulting findings may induce the Commission to reopen prior lump sum settlements on the basis of mistaken fact.[90] The same may happen when an employer defeats an ADA case using the direct threat defense after settling a partial disability case for a small lump sum.

IX. CONCLUSION

The ADA is moral law, expressed in wide terms. Its remedies will encourage litigation, and compensation claimants' counsel are perhaps the best prepared members of the bar to represent ADA plaintiffs. But the two disability law regimes do not co-exist in perfect harmony. In order to succeed under the federal scheme, Mississippi claimants' counsel must mimic their opponents and immerse themselves in the statute's details.

However, if claimants' counsel must become more like us, it is also true that we must become more like them. We who have cut our teeth on Title VII and National Labor Relations Act doctrine will find that the ADA compels us to become much more interdisciplinary. We must learn how to work with occu-

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NETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5124 n.28 (Supp. 1992).

[90] *See* MISS. CODE ANN. § 71-3-53 (1972); Staples v. Blue Cross & Blue Shield, Inc., 585 So. 2d 747, 748-49 (Miss. 1991) (holding that proof of mistaken facts allow case to be reopened for review); Metal Trims Industries, Inc. v. Stovall, 562 So. 2d 1293, 1297 (Miss. 1990) (allowing case to be reopened despite lump sum settlement).

pational rehabilitation specialists, orthopedists, and psychiatrists. In addition, we must become more artful courtroom dramatists. If we fail in this transition, we will be unprepared for ADA jury trials.

Employment litigation grew at a remarkable pace following enactment of the 1964 Civil Rights Act. Congress has created the conditions for another bull market.

ACCIDENTAL INJURY UNDER THE MISSISSIPPI WORKERS' COMPENSATION ACT: FEWER COMPENSABLE CLAIMS AND A PANDORA'S BOX OF TORT LIABILITY

I. INTRODUCTION

In 1988 the Mississippi Legislature amended the Mississippi Workers' Compensation Act by adding language to the definition of injury. Additional changes are under consideration by the 1993 Legislature that would change the term *injury* and add a new definition for *accident*.[1] The proposed

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[1] H.R. 837, 108th Leg., Reg. Sess., § 71-3-3 (1993). The pertinent text of the 1993 amendment proposed in the House of Representatives follows:

> (b) "Accident" means an unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently, with or without human fault, and directly producing at the time objective findings of an injury which is more than simply a gradual deterioration or progressive degeneration.
>
> (c) "Injury" and "personal injuries" includes only injuries by violence to the physical structure of the body and such disease or infections as naturally result therefrom. These terms shall in no case be construed to include any other form of disease or derangement, however caused or contracted.
>
> > (i) Mental injury caused by mental stress. Mental injury or illness resulting from work-related stress shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter, unless the mental injury was the result of a sudden, unexpected, and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence.
> >
> > (ii) Mental injury caused by physical injury. A mental injury or illness caused by a physical injury to the employee's body shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless it is demonstrated by a preponderance of the evidence.
> >
> > (iii) No mental injury or illness shall be compensable either under subparagraph (i) or (ii) unless the mental injury or illness is diagnosed by a licensed psychiatrist or psychologist and the diagnosis of the condition meets the criteria as established in the most

changes are virtually the same as those which Louisiana made in its workers' compensation laws in 1989. This comment contains the following: (1) a brief history of the purpose behind workers' compensation, including a survey of the common law tort remedies which were available to workers prior to the enactment of workers' compensation; (2) a discussion of the 1988 Mississippi amendments and the Mississippi Supreme Court's interpretation of those changes; and (3) an analysis of the possible effects of the proposed 1993 amendments and the resulting impact on the exclusive remedy provision. The third segment deals particularly with whether the new definitions narrow the scope of workers' compensation and, if so, whether claims may be pursued under common law remedies.

II. HISTORICAL DEVELOPMENT OF WORKERS' COMPENSATION AND TORT REMEDIES AVAILABLE TO THE EMPLOYER

A. *Historical Development*

Germany enacted the first workers' compensation statute in 1884.[2] Eventually England and the United States also pro-

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> current issue of the Diagnostic and Statistical Manual of Mental Disorders presented by the American Psychiatric Association.
>
> (iv) Heart-related or perivascular injuries. A heart-related or perivascular injury, illness, or death shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless it is demonstrated by a preponderance of the evidence that:
>
> > a) The physical or mental work stress was extraordinary and unusual in comparison to the stress or exertion experienced by the average employee in that occupation, and
> >
> > b) The physical or mental work stress or exertion, and not some other source of stress or preexisting condition, was the predominant and major cause of the heart-related or perivascular injury, illness or death.

H.R. 837, 108th Leg., Reg. Sess., § 71-3-3 (1993). The legislation also amends § 71-3-7 such that it reads as follows: "Compensation shall be payable for disability or death of an employee from *an accidental* injury or occupational disease arising out of and in the course of employment, without regard to fault as to the cause of the injury or occupational disease." H.R. 837, 108th Leg., Reg. Sess., § 71-3-3 (1993) (emphasis added). Although House Bill 837 died in committee in the 1993 session, indications are that similar legislation may continue to arise in the future.

[2] ALBERT J. MILLUS & WILLARD J. GENTILE, WORKERS' COMPENSATION LAW

vided protection for the injured worker through workers' compensation.[3] In the United States the huge economic growth and industrial activity of the nineteenth century pushed the plight of the worker to the forefront of political and social concerns.[4] In 1902, Maryland enacted the first workers' compensation legislation in the United States.[5] Though the Maryland law eventually failed to sufficiently protect the worker, it encouraged other states to consider similar legislation.[6] New York passed a workers' compensation law in 1910 as a result of a New York State Study Commission Report.[7] New York's workers' compensation law encountered early constitutional challenges and forced New York to amend its constitution in reaction to initial decisions by the New York courts declaring the statute unconstitutional.[8] All but six states had passed

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AND INSURANCE 5 (1976).

[3] *Id.* England's parliament enacted a workers' compensation statute in 1897. *Id.*

[4] *Id.* at 5. As economies of entire nations changed from agricultural to industrial, the oppressive and difficult conditions affected the lives of many people. *Id.* The industrial growth caused a rise in accidents and deaths among the workforce. *Id.* Unfortunately the worker commonly bore the burden of any loss due to an injury. *Id.*

[5] JACK B. HOOD & BENJAMIN A. HARVY, JR., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS 1 (1984). The Maryland law protected workers involved in mining, steam or street railroads, quarrying and municipal construction. MILLUS, *supra* note 2, at 20.

[6] HOOD, *supra* note 5. The law was applicable only in the event of death. MILLUS, *supra* note 2, at 20.

[7] Alben N. Hopkins, Comment, *Heart Attacks in Workers' Compensation - The Mississippi Experience*, 44 MISS. L. J. 226, 227 (1937). Because many states commissioned extensive studies before enacting workers' compensation laws, the development in this area moved more slowly in the United States than in Europe. MILLUS, *supra* note 2, at 5.

[8] HOOD, *supra* note 5, at 10; *see* Ives v. S. Buffalo Ry., 94 N.E. 431, 448 (N.Y. 1911) (declaring void New York's workers' compensation statute based on taking of property in violation of due process). Because of the *Ives* decision, most states did not make their workers' compensation plans compulsory. MILLUS, *supra* note 2, at 31. *Contra* State v. Clausen, 117 P. 1101, 1120 (Wash. 1911) (stating specific disagreement with the *Ives* decision). In 1917 the United States Supreme Court handed down three decisions upholding the power of a state to enact elective as well as compulsory workers' compensation statutes. MILLUS, *supra* note 2, at 31; *see* New York R.R. v. White, 243 U.S. 188, 209 (1917) (affirming right of state to require workers' compensation); Hawkins v. Bleakly, 243 U.S. 210, 213-214 (1917) (right of state to require workers' compensation upheld); Mountain

workers' compensation statutes by 1920.[9] In 1948 Mississippi enacted a comprehensive workers' compensation system, becoming one of the last states to do so.[10] Except with respect to the omission of occupational disease coverage, the Mississippi act earned the distinction of being one of the best in the country.[11] The Mississippi Workers' Compensation Act required both the employee and employer to give up certain rights and duties.[12] The exclusive remedy provision of the Mississippi Workers' Compensation Act protects the employer from common law actions.[13] In addition it protects co-employees officers or agents of a corporation acting within their scope of authority.[14] The statute applies to all employees whose injuries "arise out of and in the course of employment, without regard to fault as to the cause of the injury or occupational disease."[15]

Timber Co. v. Washington, 243 U.S. 219, 246 (1917) (affirming right of state to require workers' compensation).

[9] Hopkins, *supra* note 7, at 227. Mississippi was one of the six which had not enacted a workers' compensation statute prior to 1920. *Id.*

[10] VARDAMAN S. DUNN, MISSISSIPPI WORKERS' COMPENSATION § 2 (3d ed. 1982 & Supp. 1990).

[11] Arthur Larson, *Workmens' Compensation in Mississippi: The First Five Years*, 25 MISS. L. J. 109, 109 (1954). The Mississippi legislature amended the act in 1968 and classified occupational diseases as accidental injuries. John R. Bradley, Jr., *Two Workers' Compensation Law Amendments: Definition of "Injury" and Method of Stating Maximum Benefits, How the Commission Squares with the Supreme Court*, THIRD ANN. MISS. WORKERS' COMP. EDUC. CONF., Mississippi Workers' Compensation Commission and Workers' Advisory Council, Paper Presentation of May 13, at 22 (1988).

[12] DUNN, *supra* note 10. The employee lost his right to proceed under common law actions against the employer. *Id.* In return the employer paid the employee for his injury without regard to fault. *Id.*

[13] Philip M. Reeves, Note, *Workers' Compensation — Carrier's Intentional Tort Not Controlled by Exclusive Remedy Provision — Southern Farm Bureau Casualty Insurance Co. v. Holland, 469 So. 2d 55 (Miss. 1984)*, 5 MISS. C. L. REV. 201, 202 (1985). "The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death . . . ." MISS. CODE ANN. § 71-3-9 (1972 & Supp. 1992).

[14] Reeves, *supra* note 13.

[15] MISS. CODE ANN. § 71-3-7 (1972 & Supp. 1992).

B. *Tort Actions Available Prior to Workers' Compensation*

Enactment of workers' compensation as the exclusive remedy for injured employees supplanted common law as the primary remedy upon which the injured employee sought damages for injuries.[16] Under common law the employer had an absolute duty to the employee to provide a reasonably safe place to work; to furnish reasonably safe appliances, tools and equipment; to warn an inexperienced employee of dangers of which he is ignorant; to provide a sufficient number of employees to get the job done safely; and to promulgate and enforce work rules relating to employee conduct and safety procedures.[17] These theories of employer liability are still used in actions against employers who are not required to have workers' compensation coverage, third parties who assume some of these duties and employers exempted from the exclusive remedy provision.[18] Although the duties owed to the employee seem to have been a formidable arsenal at the employee's disposal, many times he was unable to collect damages due to the "unholy trinity" of defenses available to the employer.[19] The employer in a majority of cases could successfully use contributory negligence, assumption of the risk and the fellow-servant doctrine to defeat most claims against him.[20]

It would seem the employer has the ability to protect himself against tort liability for accidental injuries which may not fall under the coverage of workers' compensation. However, upon closer examination of employer liability law in Mississippi, it becomes obvious that the employer does not have the advantage of any one of the "unholy trinity."

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[16] HOOD, *supra* note 5, at 1; *see* MILLUS, *supra* note 2, at 8 (listing duties of employer at common law).

[17] *Id.* at 1-2. Breach of these duties subjected the employer to a common law negligence action. MILLUS, *supra* note 2, at 9. Thus the common law actions were based on fault. *Id.*

[18] DUNN, *supra* note 10, at §13. There must be five or more workers before workers' compensation precludes other remedies. *Id.*; MISS. CODE ANN. § 71-3-5 (1972 & Supp. 1992). The workers' compensation statute lists various requirements and exceptions to determination of coverage under the act. MISS. CODE ANN. § 71-3-3 (1972 & Supp. 1992); *see* DUNN, *supra* note 10, at §§ 13-18. Discussion of these are beyond the scope of this comment.

[19] HOOD, *supra* note 5, at 2.

[20] *Id.*; *see* MILLUS, *supra* note 2, at 9-12.

1. *Nondelegable Duties and Abrogation of the Fellow-Servant Doctrine*

At common law the employer had the duty to provide a reasonably safe place to work[21] and to provide safe instrumentalities with which to do the work.[22] "The ground of liability in respect to unsafe places to work is not danger, but negligence."[23] In order to recover, the employee must show that the employer had notice of the danger of the unsafe place which caused the employee's injury.[24] Employers often used the fellow-servant doctrine to escape liability for injuries caused by the negligence of a fellow employee even if part of the cause was the result of failure by the employer to provide a safe place to work and safe instrumentalities.[25] In Mississippi this is not the case. Judicial decisions in Mississippi have limited and, in most cases, totally abrogated the fellow-servant doctrine. In *Tribble v. Gregory*[26] a tractor ran over and injured an employee attempting to crank the tractor by connecting the ignition switch to the starter with a screwdriver.[27] The employer argued that he was not liable because he acted reasonably by warning his manager to replace the faulty switch and his manager's failure to do so relieved the employer of liability under the fellow-servant doctrine.[28] The court held that the duty to provide a safe place to work and safe appliances was a non-delegable duty and thus the fellow-servant rule did not apply.[29] "[I]n order to relieve the master

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[21] Holliday v. Fulton Band Mill, Inc., 142 F.2d 1006, 1007 (5th Cir. 1944). The employer is not an insurer against all eventualities. Harvey v. Smith, 198 So. 739, 740 (Miss. 1940). The employer's obligation "is to use reasonable care to provide against such eventualities as, in a given situation, a reasonably prudent person should have anticipated or foreseen as likely to happen." *Id.*; *see* Gulf Refining Co. v. Williams, 185 So. 234, 235 (Miss. 1938) (explanation of reasonably prudent person standard as applied in Mississippi).

[22] Texas Co. v. Mills, 156 So. 866, 870 (Miss. 1934). The duty to furnish safe instrumentalities to the employee is a common law duty of the employer. *Id.*

[23] Seifferman v. Leach, 138 So. 563, 564 (Miss. 1932).

> When the master has taken reasonable care to furnish a reasonably suitable and safe location for the doing of the particular work and there installed the ordinary and generally approved equipment suitable and proper for the place and for the work of the kind there being done and this equipment is in adequate repair, and he has furnished the appliances easily to be used in connection therewith which when used will render the operation as safe as may reasonably be done . . . the master has performed his duty . . . although there still be danger in the work.

Id. Claimant attempted to adjust a loose belt on machinery while the machine was in motion. *Id.* at 563. The negligence standard applies as well to the failure to provide safe tools and appliances. Brown v. Coley, 152 So. 61, 62 (Miss. 1934). In this case the employer provided the employee' with a funnel to fill the gas tank of a small engine. *Id.* at 62. In the process of filling the tank while the engine was running gas splashed on the engine, caught fire and severely burned the employee. *Id.* Thus it was the employees negligence, not the equipment, which caused the accident. *Id.* Where the employer has furnished safe appliances with which to do the work, he has met his obligation; this is so even though there may be danger existing in the work. *Id.* at 63.

[24] Gulf, M. & N. R. Co. v. Brown, 108 So. 503, 504 (Miss. 1926). The general rule of negligence concerning liability of one person for the injuries of another is that "he will be liable for all such harm as a reasonably prudent person would or

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should have anticipated as the natural and probable consequences of his act." *Williams*, 185 So. at 235. In other words, "the act must be of such character and done in such a situation that the person doing it should reasonably have anticipated that the injury to another will probably result therefrom." *Id.*

[25] HOOD, *supra* note 5, at 2. The negligence of a fellow servant was said to be one of the risk incident to any employment and that the employee assumed the risk of injury by such fellow servant. *Id.*

[26] 288 So. 2d 13 (Miss. 1974).

[27] *Gregory*, 288 So. 2d at 14-15. The employee had positioned himself between the front and back tires on the side of the tractor. *Id.* Under current workers' compensation law farm labor and all activities associated with farming are exempt from the coverage of workers' compensation. DUNN, *supra* note 10, at § 4.1. Because of this exception, case law has developed regarding employer liability to farm employees. The principles in these cases can be transferred to other forms of employment actions.

[28] *Gregory*, 288 So. 2d at 15. The employer's manager was present and instructed the employee to do this while he poured ether into the breather cap at the same time. *Id.* The defective safety switch on the clutch proved to be the cause of the sudden start of the engine with the gears engaged. *Id.* The employer purchased a new safety switch several days prior to the accident and instructed the manager to have it installed. *Id.* Unfortunately the manager failed to install the switch prior to the day of the accident. *Id.* The employer proceeded under a theory of dual capacity which is similar to the fellow servant doctrine, however the court refused to apply the doctrine of dual capacity for the same reason it refused to apply the fellow servant rule; the duty of the employer was non-delegable. *Id.* at 16.

[29] *Id.* at 15. The court supported the idea that a safe-work environment is a non-delegable duty. *Id.*; *see* Texas Co. v. Mills, 156 So. 866 (Miss. 1934)

from liability for an injury to one of his servants, the negligence of a fellow-servant must have been the sole cause of the injury and not commingled or combined with the negligence of the master or his representative."[30] The result of *Gregory* and other Mississippi decisions makes the fellow-servant defense, which in other states is detrimental to employee's claims, useless when combined with a non-delegable duty.[31] The rule that an employer must provide a sufficient number of employees to accomplish the work required in a reasonably safe manner is in effect an extension of the non-delegable duty of the employer to provide a safe place to work.[32] Likewise, the duty of the employer to warn the employee of hazards which are not open and obvious is an extension of the non-delegable duty to provide a safe place to work.[33] The sum effect of the judicial opinions on these issues is an abrogation of the fellow-servant rule in most if not all claims grounded under the common law theories of liability.[34]

2. Assumption of the Risk Defense Invalid in Mississippi, When the Employer Is Not Negligent

Early Mississippi cases set forth the rule that hazards which are "the ordinary dangers and risk of the employment . . . are assumed by the servant when he accepts the employment."[35] The employer must exercise reasonable care

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(employer's duty to furnish safe truck is non-delegable).

[30] *Gregory*, 288 So. 2d at 15-16.

[31] Scott Burr Stores Corp. v. Morrow, 180 So. 741, 742 (Miss. 1938). In addition to the two duties already discussed, the duty to promulgate rules of work and safety and to see that they are enforced is a non-delegable duty of the employer. *Id.* at 743; *see* Albert v. Doullut & Ewin, 178 So. 312, 313 (Miss. 1938) (delegation of duty to promulgate rules does not prevent employer liability).

[32] Buford v. O'Neal, 128 So. 2d 553, 556 (Miss. 1961). The employee injured in this case was helping several others move a 3000 pound flywheel. *Id.* at 555. Employer must show employer did not use reasonable care and prudence in furnishing a sufficient number of workers. *Id.* at 556.

[33] Federal Compress Co. v. Craig, 7 So. 2d 532, 535 (Miss. 1942); *see* Long v. Wollard, 163 So. 2d 698, 705 (Miss. 1964) (disconnecting wrecker from truck is simple act not requiring warnings of dangers).

[34] The Mississippi Legislature statutorily abolished the fellow-servant rule as to railroad employees. MISS. CODE ANN. § 77-9-439 (1972).

[35] Gulf, M. & N. R.R. v. Brown, 108 So. 503, 504 (Miss. 1926); *see* Howd v.

to provide a safe place to work and has to meet that duty even if dangers incident to the employment remain.[36] The Mississippi legislature reacted to the assumption of risk defense by statutorily abolishing it where the employer is negligent.[37] The statute requires that the employee prove negligence on the part of the employer in personal injury accidents resulting in injury or death.[38] If the employer was not negligent, then he may use the assumption of the risk as a defense.[39]

3. Contributory Negligence No Longer Bars Injured Employees From Recovery

One of the earliest common law defenses to develop, contributory negligence precluded the injured person from recovery if the injured person was negligent.[40] "[A]lthough the employer might be 99% negligent, a contribution of fault even to

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Miss. Cent. R.R. Co., 50 Miss. 178, 186 (1874) (setting forth early rule that servant accepts risk incident to employment).

[36] Crosby v. Burge, 1 So. 2d 504, 507 (Miss. 1941). Normal ordinary and inherent risk of the employment are assumed by the employee. *Id.* Negligence by the employer which causes injury to his employee precludes the use of the doctrine of assumption of risk. Hercules Power Co. v. Williamson, 110 So. 244, 246 (Miss. 1926). If the "plan [of work] is inherently defective and unnecessarily dangerous," the employer is liable for any resulting injury. *Id.*; *see* Robert L. Spell, *Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assumption of Risk*, 8 MISS. C. L. REV. 159 (1987) (overview of assumption of risk doctrine in Mississippi).

[37] MISS. CODE ANN. § 11-7-19 (1972). The statute states the following:

> In all actions for personal injury to an employee, and in all actions where such injury results in death, such employee shall not be held to have assumed the risk of his employment in any case where such injury or death results in whole or in part from the negligence of the master. This rule shall not apply to conductors, or locomotive engineers, in charge of dangerous or unsafe cars or engines voluntarily operated by them.

Id.

[38] *Id.*

[39] Meridian Laundry Co, Inc. v. James, 195 So. 689, 691 (Miss. 1940). The court stated that the statute had no application here because the employer was not negligent. *Id.* "It deals with risks caused by the master, not risks incident to the employment." *Id.*; *see* Ingalls Shipbuilding Corp. v. Treher, 155 F.2d 202, 203 (5th Cir. 1946) (employer negligence precludes use of doctrine of assumption of risk by employer); Smith v. Jones, 220 So. 2d 829, 831 (Miss. 1969) (doctrine of assumption of risk not in force between employer and employee).

[40] MILLUS, *supra* note 2, at 9.

the extent of 1% on the part of the employee would defeat his recovery."[41] Thus, this resulted in the employee absorbing the entire cost of his carelessness while the employer may have also contributed to the injury.[42] In the case of *Louisville & N.R.R. v. Thomas*[43] a railroad brakeman, upon being notified that the train was approaching the station, positioned himself on top of the car in order to apply the brakes, and the impact knocked him off and killed him.[44] The court found that the issue of the deceased's contributory negligence was one for the jury; however, if the jury found that the death was caused by his contributory negligence, then they must find for the defendant.[45] An employee who placed himself voluntarily and knowingly in a position of grave danger would also have no recovery against his employer.[46] Mississippi does not have the problem of contributory negligence acting as a total bar to recovery due to the enactment of its comparative negligence statute in 1910.[47]

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[41] *Id.* Exceptions to the normal common law defense such as if the employer had the last clear chance or the employer acted intentionally may allow the employee some recovery. W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS 569 (5th ed. 1984).

[42] *Id.*

[43] 40 So. 257 (Miss. 1906).

[44] *Thomas*, 40 So. at 257. The evidence showed that he either fell off the train or ran into a low bridge. *Id.* The railroad contended that because of his contributory negligence of not looking out for a bridge that he knew existed, the court should bar recovery. *Id.*

[45] *Id.* at 258. The court instructed the jury that if the deceased was contributorily negligent, or not performing duties within the scope of his employment, or if the railroad warned the deceased, then they were to find for the defendant. *Id.*

[46] Jones v. Greer Rice Dryer and Shop, Inc., 262 So. 2d 419, 420 (Miss. 1972); *see* City of Meridian v. Godwin, 185 So. 2d 433, 437 (Miss. 1966) (finding that garbageman did not place himself in dangerous position, but dangerous condition of truck caused injury).

[47] Olger C. Twyner, *A Survey and Analysis of Comparative Fault in Mississippi*, 52 MISS. L. J. 563, 570 (1982). Mississippi's statute states that:

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

In view of this survey of tort remedies available to the employee, it is obvious that the employer's duties under common law hold him to a high standard regarding the safety of his workers. The so called "unholy trinity" of defenses that blocked or frustrated most employees' attempts to recover for injury in most states are difficult to use in Mississippi. Legislative action has watered down contributory negligence and assumption of the risk such that an employee would receive some compensation even if he was negligent. Likewise the fellow-servant doctrine is ineffective due to the decisions which refuse to recognize it if a non-delegable duty is breached. In the final analysis Mississippi had some of the strongest laws in the country which, unlike other states, favored the employee. After analyzing the current law concerning the definition of accidental injury the remainder of this comment will discuss the proposed amendments and the possibility that employers may be open to the tort actions discussed in certain situations.

III. THE CURRENT MEANING OF *ACCIDENTAL INJURY* UNDER THE 1988 AMENDMENTS

In order to fully understand the effect of the proposed changes in the definition of *accident* and *injury*, we must first examine how the court has defined *accidental injury* in past cases.[48] Prior to the 1988 amendment to section 71-3-3 the Workers' Compensation Act defined injury as an "accidental injury or accidental death arising out of and in the course of employment . . . ."[49] Shortly after adoption of the workers'

MISS. CODE ANN. § 11-7-15 (1972). The plaintiff could recover regardless of his degree of fault and the statute eliminated the defense of contributory negligence. Twyner, *supra* at 563. Mr. Twyner's article presents a very good overview of the development of comparative negligence and events surrounding the legislative death knell for contributory negligence in Mississippi.

[48] The term *accident* in its commonly accepted meaning is an "event or condition occurring by chance or arising from an unknown or remote cause." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11 (3d ed. 1971). An injury is an "act that damages, harms or hurts: an unjust or undeserved infliction of suffering or harm." *Id.* at 1164.

[49] John G. Jones, *New Definition of Injury, Causal Connection and Apportion-*

compensation statute, the Mississippi Supreme Court confronted the issue as to whether or not cases involving an unexpected result occurring under usual working conditions, without an external force causing the result, would meet the definition of injury.[50] The court dealt with this issue in *Ingalls Shipbuilding Corp. v. Byrd.*[51] In *Byrd* the claimant suffered partial paralysis due to an unknown pre-existing malformation of blood vessels in his back.[52] Pressure and vibrations arising from and in the ordinary course of his employment aggravated the malformation resulting in paralysis.[53] The court concluded that "when usual exertion leads to something actually breaking, herniating, or letting go, with an obvious sudden mechanical or structural change in the body, the injury is accidental."[54] The explanation given by the court in *Byrd*

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ment: Where do we go from here? THIRD ANN. WORKERS' COMP. PRAC. & PROC. SEMINAR, Paper Presentation, at 2 (1990).

[50] Bradley, *supra* note 11, at 11. In England the question was well settled that a unexpected result was an accidental injury. 1A ARTHUR LARSON, THE LAW OF WORKMENS' COMPENSATION § 38.20 (1992). Although the cause of the injury may be routine, the effect on the worker was unexpected and thus accidental. *Id. See generally* Francis H. Bohlen, *A Problem in the Drafting of Workmens' Compensation Acts*, 25 HARV. L. REV. 517 (1912) (discussing construing terminology in workers' compensation statutes and particular considerations in drafting statutes).

[51] 60 So. 2d 645 (Miss. 1952).

[52] *Byrd*, 60 So. 2d at 647.

[53] *Id.* at 647. The claimant was a chipper and his job entailed the use of a chisel operated by compressed air. *Id.* Claimant exerted a forward pressure on the instrument by placing his body against the recoil and bracing himself with his legs. *Id.* Apparently this aggravated the unknown affliction over a period of time and caused the injury. *Id.*

[54] *Byrd*, 60 So. 2d at 649 (quoting 1A ARTHUR LARSON, THE LAW OF WORKMENS' COMPENSATION § 38.20 (1992)); *see* Hardins Bakeries v. Ranger, 64 So. 2d 705, 708 (Miss. 1953) (definition of accidental injury does not require that external force or unexpected occurrence cause injury before it falls under workers' compensation). The next "interesting contention" to arise concerned whether or not heart attacks would be treated as accidental injuries. Hopkins, *supra* note 7, at 226. The court struggled with the contention but eventually the court concluded that heart attacks suffered while on the job in the routine performance of the claimants duties met the definition of accidental injury. *Id.*; *see* Pennington v. Smith, 100 So. 2d 569, 570 (Miss. 1958) (suffering heart attack while engaged in usual activities as butcher is compensable under definition of accidental injury); L.B. Priester & Son v. McGee, 106 So. 2d 394, 397 (Miss. 1958) (suspicion that heart attack may occur at some point in future based on knowledge of prior heart attack does not preclude accidental classification).

has remained unchanged in subsequent cases.[55]

Today courts have shifted the focus from whether the injury was accidental to whether or not there is a causal connection between the work and the resulting injury.[56] The requirement of causal connection results in some confusion when the employee is not at work when the accident occurs.[57] Moreover, in the cardiac cases it may be difficult if not impossible to show the work caused or contributed to the heart attack.[58]

The 1988 amendment to section 71-3-3[59] may now be ex-

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[55] Tate v. Dr. Pepper Bottling Co., 70 So. 2d 602, 604 (Miss. 1954). Claimant was a route salesman and his employment required him to spend a large number of hours on the road. *Id.* at 603. A knot developed at the base of his spine and resulted in a period of total disability while he underwent surgery. *Id.* The court cited *Byrd* and confirmed that an accident was not required to result suddenly or from the application of external force. *Id.* at 604.

[56] Bradley, *supra* note 11, at 13. The court has concluded that the employment does not actually have to cause the injury, only that it rationally contributes to it. Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 890 (Miss. 1980); *see* Earnest v. Interstate Life & Accident Ins. Co., 119 So. 2d 782, 784 (Miss. 1960) (injury due to firearm while working not compensable under workers' compensation where employment does not require employee to carry it).

[57] Charles N. Clark Assoc., Ltd. v. Dependents of Robinson, 357 So. 2d 924, 925 (Miss. 1978). Claimant suffered from a back condition which his work aggravated but did not cause. *Id.* He visited a doctor on the suggestion and authorization of his employer and died on his return home in an auto accident. *Id.* The court held that there was causal connection between the employees' employment and his death. *Id.* at 929; *see* Prince v. Nicholson, 91 So. 2d 734, 737 (Miss. 1957) (suffering stroke while on work break compensable injury and employment was contributing cause of stroke).

[58] DUNN, *supra* note 10, at § 92. In these cases the best way to describe the proof required is that the work stress and strain must be greater than the ordinary wear and tear of everyday life. *Id.* Any attempt to fit all heart attack cases into this requirement, however, is impossible because the courts have consistently awarded compensation where no unusual stress or strain was evident. *Id.*; *see* Lewis v. Trackside Gasoline Station, 103 So. 2d 868, 871 (1958) (working in gasoline station when heart attack occurred); Ingalls Shipbuilding Corp. v. Dickerson, 92 So. 2d 354, 358 (Miss. 1957) (building scaffolding when heart attack occurred).

[59] MISS. CODE ANN. § 71-3-3(b) (1972 & Supp. 1992).

> (b) "Injury" means accidental injury or accidental death arising out of and in the course of employment *without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner. Untoward event includes events causing unexpected results. An untoward event or events shall not be presumed to have arisen out of and in the course of employment, except*

amined while keeping in mind the previous discussion concerning the meaning and scope of a compensable accidental injury. Initially there was a concern that additional language in the 1988 amendment raised the burden of proof in the showing of causal connection.[60] Prior to 1988 the only major issue Mississippi required the claimant to prove was the causal connection between the injury and the work.[61] Therefore, if

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in the case of an employee found dead in the course of employment.

Id. The italicized portion represents the pertinent language added by the legislature.

[60] Jones, *supra* note 49, at 4. Mississippi uses the medical test as opposed to the legal test of causation. *Id.* The legal test if applied rigidly could result in a required showing of an event or events causing the injury and may have arbitrary results. 1A ARTHUR LARSON, THE LAW OF WORKERS' COMPENSATION § 38.83 (1992). An example is the case of idiopathic falls. *Id.* Under the legal cause test in most jurisdictions there is no compensable injury for any resulting injury unless something in the workplace caused the accident. *Id.* For example a Tennessee court refused benefits to a worker by finding that there was no hazard incidental to the employment that contributed to the fall of an employee of a gas station. Sudduth v. Williams, 517 S.W.2d 520, 523 (Tenn. 1974). Mississippi is among a minority of states that will award compensation in such a situation. LARSON, *supra* § 12.14, n.24. Arizona, California, Connecticut, Indiana, Louisiana, New Jersey, Pennsylvania and Texas along with Mississippi are in this minority. *Id.* A worker fell as a result of a grand mal seizure and died due to head injuries sustained when his head hit the concrete. Chapman v. Hanson Scale Co., 495 So. 2d 1357, 1359 (Miss. 1986). The Mississippi Supreme Court found that "exposure to falls upon a concrete floor [is] a sufficient risk attendant upon employment so that an injury caused in part thereby is compensable." *Id.* at 1361. Thus the court in effect decided that the medical cause was the blow to the head and the employer sustained it while at work in his usual course of employment. *Id. Contra* Nu-Way Laundry & Cleaners v. Palmer, 670 S.W.2d 464, 465 (Ark. 1984) (employer must place employee in position of increased danger in order for fall to be compensable).

[61] Cole v. Superior Coach Corp., 106 So. 2d 71, 72 (Miss. 1958). The claimant in *Superior Coach* sought benefits for a back injury received while engaged in his normal work. *Id.* The medical testimony of the claimant's doctors contradicted the expert witnesses called by the employer. *Id.* Additional testimony from witnesses to the injury also contradicted his doctor's findings. *Id.* The court concluded that expert testimony must establish medical causation, and where there is a conflict, the commission must rule on the testimony. *Id.* The court upheld the commission's decision not to grant the claimant additional disability compensation. *Id.*; *see* R. C. Petroleum, Inc. v. Hernandez, 555 So. 2d 1017, 1021 (Miss. 1990) (circumstantial evidence may be enough, however, medical testimony generally required); Sonford Products Corp. v. Freels, 495 So. 2d 468, 472 (Miss. 1986) (must prove medical causation to show causation in fact if not within general knowledge of layman), *overruled on other grounds*, Bickham v. Dept. Mental

the resulting injury occurred with or without external force, the claimant need only show, by expert medical testimony, that the work in some way contributed to the injury.[62] The early questions arose from the requirement that the injury result from an "untoward event or events" and that the employment "contribute to or aggravate" the injury "in a significant manner."[63] Two recent decisions by the Mississippi Supreme Court have addressed the untoward event and significant manner requirements. In the first, *Smith v. Container General Corp.*,[64] the claimant fell as a result of alcohol withdrawal seizures while on the job.[65] The court concluded that

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Health, 592 So. 2d 96, 98 (Miss. 1991) (*Sonford* court erred in holding that circuit court could grant interlocutory appeal).

[62] DUNN, *supra* note 10, at § 273.

> Where disability or death results directly from a cause which may or may not be associated with injury, such as a heart attack, an award cannot be made in the absence of medical proof of causal connection.
>
> It has been held that the claimant has the burden of proof on the question of causal connection and generally that the proof must rise above mere speculation, conjecture, or possibility, as where the medical testimony is that it could have been one way just as well as the other. On the other hand, it is said that the burden may be carried by circumstantial evidence and, from the medical standpoint, upon reasonable probabilities.

Id.; *cf.* L. B. Priester & Son v. Dependents of Bynum, 141 So. 2d 246, 249 (Miss. 1962) (upholding presumption of causal connection when employee found dead at work). The definition adopts the case law surrounding the found dead presumption by stating that "[a]n untoward event or events shall not be presumed to have arisen out of and in the course of employment, except in the case of an employee *found dead in the course of employment.*" MISS. CODE ANN. § 71-3-3(b) (1972 & Supp. 1992) (emphasis added).

[63] MISS. CODE ANN. § 71-3-3(b) (1972 & Supp. 1992). Webster's defines "untoward" as "unfortunate, unlucky, not usual or expected." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2513 (3d ed. 1971). Black's Law Dictionary lists "untoward event" under "unlooked for mishap or untoward event" and defines it as "one occurring unexpectedly and not naturally or in ordinary course of events." BLACK'S LAW DICTIONARY 1537 (6th ed. 1990). The new definition of injury does not affect the prior case law concerning accidental injuries due to physical trauma. Most of the new language comes from case law dealing with mental claims unaccompanied by physical trauma. *See* Johnson v. Gulfport Laundry & Cleaning Co., 162 So. 2d 859, 862 (Miss. 1964) (requiring evidence of untoward event causing mental trauma).

[64] 559 So. 2d 1019 (Miss. 1990).

[65] *Smith*, 559 So. 2d at 1020. Parties stipulated that claimant fell as a result of alcohol withdrawal syndrome. *Id.* The administrative law judge found the claimant caused the risk due to her personal condition and rejected the claim for

the employee's injuries resulted from a work-related risk that a worker would fall in the course of employment and an injury would result.[66] The court went on to comment that although the decision in this case required application of the pre-1988 definition of injury, nothing in section 71-3-3 as amended altered the law in the current case.[67] The most recent decision concerning the 1988 amendment is *KLLM, Inc. v. Fowler*.[68] While driving a truck for KLLM, the claimant began experiencing severe pain in his leg and back.[69] Claimant's employer, KLLM, argued that the new definition of injury changed the focus to the cause of the injury.[70] In essence they argued that an untoward event must cause the injury under the revised definition, thus increasing the claimant's burden of proof of causal connection.[71] The court dismissed this argument and held "that the revised definition does no more than codify existing law, at least insofar as it pertains to [issues presented in this case]."[72] The *Smith* and

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benefits. *Id.* at 1021. The Supreme Court reversed and remanded. *Id.*

[66] *Id.* at 1022. The court compared the injury to the one a claimant suffered when he sneezed while driving the employer's truck. Malone & Hyde v. Hall, 183 So. 2d 626, 630 (Miss. 1990). The sneeze apparently damaged a pre-existing degenerate intervertebral disk. *Id.* The court in *Hall* concluded that there was no work related risk inherent in the employment which caused the injury; therefore, no causal connection existed. *Id.*

[67] *Smith*, 559 So. 2d at 1022.

[68] 589 So. 2d 670 (Miss. 1991).

[69] *Fowler*, 589 So. 2d at 670. Claimant's other duties included lifting items weighing 80 to 90 pounds, bending, and coupling/uncoupling trailers. *Id.* The cumulative effect placed enormous stress and strain on his back. *Id.* A physical examination revealed the cause of the pain was a extruded fragment of disc. *Id.* Claimant underwent surgery to have the disk removed and has been unable to return to work since that time. *Id.* at 673.

[70] *Id.* at 674. KLLM also focused on the additional requirement of the revised statute that the "employment contribute to the injury in a significant manner." *Id.* They attempted to read this as requiring the higher standard of proof in mental injury cases in order to show cause. *Id.* The court did not feel that a new standard of proof arose from the new definition and found that "in a significant manner" did nothing more than codify existing law. *Id.* at 676.

[71] *Id.* at 675.

[72] *Id.* at 672. The court adopted the analysis offered by Professor John R. Bradley, Jr. stated in relevant part as follows:

> In its first sentence the restated definition adds a requirement that the injury result from "an untoward event or events." But the second

Fowler decisions indicate that the legislature's changes to the definition of injury in 1988 made no substantive change in the law. Also, the changes did not narrow the definition of injury to exclude compensation for previously compensable injuries.

IV. THE PROPOSED AMENDMENT TO SECTION 71-3-3: DOES NARROWING THE SCOPE SOLVE PROBLEMS OR CREATE NEW ONES?

During the 1993 Regular Session of the Mississippi Legislature, the Insurance Committee considered House Bill 837 which would have significantly changed the definition of injury under section 71-3-3 and added a new definition for accident.[73] Louisiana recently amended its workers' compensation laws, and the Mississippi House of Representatives had modeled House Bill 837 almost verbatim on the Louisiana amendment.[74] The question is whether this new definition of acci-

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> sentence says the requirement of "untoward" is met if the injury is an unexpected result. Thus, the restated definition codifies (though awkwardly) existing law in these ways.
>
> 1. An *unexpected event* is by external definition an untoward event. Harm resulting from it is covered as an injury.
>
> 2. An *unexpected result* (harm to a worker) of usual work activity is by this internal definition (and probably by external definition) an untoward event.
>
> The resulting harm is covered as an injury.

Id. at 675 (quoting Bradley, *supra* note 11, at 14) (emphasis added).

[73] H.R. 837, *supra* note 1. H.R. 837 died in committee during the 1993 regular session, however, the issue is not dead. This issue remains on the agenda of several legislators and there is every indication an attempt to pass the bill will be made again next year. A prior attempt was made in 1992 which made it through the Senate, yet was defeated by the House of Representatives. S. 2677, 107th Leg., Reg. Sess., § 71-3-3 (1992).

[74] *See* LA. REV. STAT. ANN. § 23:1021 (West Supp. 1992) (almost copied verbatim by Mississippi statute.) The only substantial difference was that House Bill 837 substituted "preponderance of the evidence" for "clear and convincing evidence" as the burden of proof for mental injury caused by physical injury and heart related or perivascular injuries. *Id.*; *see* H.R. 837, *supra* note 1. The Mississippi Senate also considered changes to the definition of injury that would narrow the definition by requiring the injury to "substantially exceed the ordinary wear and tear of life and if such accidental injury or accidental death would not have occurred but for the employment of the employee with the employer." S. 2085, 108th Leg., Reg. Sess., § 71-3-3 (1993). The impact of this change would preclude recovery by employees who could not show that "but for the employ-

dent allows employees to step outside the exclusive coverage of workers' compensation and sue their employers under the common law causes of action previously discussed.[75] In *Miller v. McRae's, Inc.*[76] the court specified when workers' compensation would bar other remedies through the act's exclusivity clause.[77] The court stated that "[w]here exclusivity of remedy is involved one must ask not only whether the injury arose out of and in the course of employment, but also whether the injury is compensable under the Workmens' Compensation Act."[78] The court has applied this requirement as a method of circumventing exclusivity only when wilful acts caused the injury in question.[79] Even if a wilful act does cause the inju-

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ment" the accident would not have happened. *Id.* Senate Bill 2085 also includes the changes made for mental injuries in House Bill 837. H.R. 837, *supra* note 1. Senate Bill 2085 died in committee during the 1993 Regular Session.

[75] *See supra* notes 17-47 and accompanying text.

[76] 444 So. 2d 368 (Miss. 1984).

[77] *Miller*, 444 So. 2d at 372. The exclusive liability clause states in part that:

> The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employees, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damage at common law or otherwise from such employer . . . .

MISS. CODE ANN. § 71-3-9 (1972 & Supp. 1992). The case involved an employee's allegation of false imprisonment against McRae's for actions taken by its head of Security. *Miller*, 444 So. 2d at 369. The claimant, Julie Miller, arrived for work and was asked to meet with the security officer, Jamal El-Amin. *Id.* El-Amin accused Miller of stealing money missing from her department. *Id.* Miller alleged he threatened her in a manner to prevent her from leaving or using the phone. *Id.* Miller alleged that she suffered humiliation, harm to her reputation, and illness. *Id.* The court found these were not types of injuries covered by workers' compensation. Id. at 372 n.2.

[78] *Miller*, 444 So. 2d at 369. Therefore, there are two elements, both of which must apply before workers' compensation bars recovery in tort. *Id.* The court specifically mentioned that one must look to the definition of *injury* to determine if the injury is compensable under the act. *Id.* Thus, the injury cannot arise out of and in the course of employment and cannot be a type of injury compensable through workers' compensation. *Id.* at 372.

[79] Griffin v. Futorian Corp., 533 So. 2d 461, 463 (Miss. 1988). The requirement that the act be intentional probably stemmed from the court's interpretation of accidental injury. *See supra* notes 50-74 and accompanying text. Thus, the element of intent to cause the injury was the only way the court could get around the definition of injury which requires that the cause or resulting injury be an untoward or unexpected event. MISS. CODE ANN. § 73-3-3 (1972 & Supp. 1992). The court looks at the question from the viewpoint of the employee and

ry, Mississippi law requires that the injury be one which is not compensable under workers' compensation.[80] If the allegations fail to meet any one of the two requirements, then the court may allow a tort action to proceed.[81]

The definitions of injury and accident proposed by House Bill 837 may narrow the definition of compensable accidental injuries such that a larger number of injuries are not compensable. The new definition does two things: First, it adds a statutory definition for *accident*, and second, it redefines the term *injury*. With regard to the term *injury*, the proposed definitions treat mental injuries and heart-related or perivascular injuries separately from the general definition of injury.[82] The proposed amendment does nothing more than codify, with some modifications, the burden of proof required to show a mental injury or heart-related injury.[83] A mental injury caused by mental stress is not compensable under the proposed amendment unless clear and convincing evidence shows the occurrence of a sudden, unexpected and extraordinary stress related to work.[84] However, only a preponderance of the evidence is required to prove a mental injury caused by physical trauma.[85] The inclusion of these specific burdens of

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asks: Was the injury unexpected by the employee? Jean C. Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CAL. L. REV. 857, 870 (1985).

[80] *Griffin*, 553 So. 2d at 463. Under *Griffin* and *Miller*, the exception for wilful acts arose not only due to the nature of the act but also "from the *type* of injury to be expected in terms of compensable physical disability." DUNN, *supra* note 10, at § 22 (Supp. 1990). "The focus here is upon whether the *type* of injury is within the statutory compensation *plan* and not upon whether the result has produced or can produce an actual award of workmens' compensation benefits in the particular case." *Id.*

[81] *Miller*, 444 So. 2d at 372. It is not entirely clear how the court would apply the two part test in *Miller* under the new statute because the facts in that case deal with wilful and intentional act by the employee. *Id.*

[82] H.R. 837, 108th Leg., Reg. Sess., § 71-3-3 (1993).

[83] Fought v. Stuart C. Irby, Co., 523 So. 2d 314, 317 (Miss. 1988). The court required the claimant to prove by "clear and convincing evidence the connection between the employment and the injury." *Id.* The court also required a mental injury that did not result from physical trauma to have been caused by more than the ordinary incidents of employment. *Id.*

[84] H.R. 837, 108th Leg., Reg. Sess., § 71-3-3 (1993).

[85] *Id.* Both types of mental injuries require expert testimony by a licensed

proof will decrease the number of compensable claims for mental injuries. Failure to meet the burden of proof required to recover compensation for a mental injury will prevent the claimant from obtaining relief; the claimant could not file a tort action because, due to the proposed amendment, workers' compensation would specifically cover the type of injury suffered.[86] Under *Miller*, if the type of injury is compensable, then workers' compensation is the exclusive remedy regardless of whether the employee can meet the burden of proof.[87]

Heart-related or perivascular injuries must meet an even stricter set of requirements.[88] The claimant must prove, by a preponderance of the evidence, physical or mental stress extraordinary and unusual from that experienced by other workers in that occupation.[89] In addition, the claimant must prove that there is no possibility that some other source or preexisting condition caused the injury.[90] Claimants may attempt to assert that because they failed to meet the burden of proof required, the injury does not fall under the proposed definition of injury and thus, a common law claim is not barred by the exclusivity clause. However, it appears that the cumulative effect of these precise requirements will only prevent recovery and will not allow the claimant recourse under common law due to the requirement set forth in *Miller*.[91]

Though the proposed definition of injury does not present many new problems, the proposed definition of accident raises several questions. Currently the statute does not define the term *accident*. However, the Mississippi Supreme Court has

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psychiatrist or psychologist that the claim meets certain criteria in the "most current issue of Diagnostic and Statistical Manual of Mental Disorders presented by the American Psychiatric Association." *Id.*

[86] *Miller*, 444 So. 2d at 372. The second element of the test enunciated in *Miller* bars other actions if the injury is compensable under workers' compensation. *Id.* Thus, the statute explicitly covers a mental injury; and if the injury occurred in the course of employment, the act provides the exclusive remedy. *Id.*; *see Griffin*, 533 So. 2d 461, 463 (Miss. 1988) (applying principles set forth in *Miller*).

[87] DUNN, *supra* at note 10, § 22.

[88] H.R. 837, 108th Leg., Reg. Sess., § 71-3-3 (1993).

[89] *Id.*

[90] *Id.*

[91] *See supra* notes 76-81, 86, 87 and accompanying text.

deemed the accidental injury requirement satisfied "if either the event [or events] resulting in the harm or the harm itself is unexpected."[92] The court has also allowed injuries developing gradually and resulting in physical harm over a period of time to meet the definition of accidental injury.[93] The proposed requirement that an accident must be an "unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently" may be an attempt to narrow the categories of compensable injuries covered by workers' compensation and to focus on the cause rather than the result.[94] The use of the term *identifiable* to modify *event* could pose problems in two areas. First, an injury that is the result of no single identifiable source or cause may fall outside of this definition of accident. Second, injuries developing gradually over time may fall outside the scope of this definition, especially when the identifiable event requirement is merged with the requirement that the injury be "more than a gradual deterioration or progressive degeneration."[95]

Alabama, Missouri, and Nevada have substantially the same definition for *accident* as Louisiana with the exception of the requirement in Louisiana that the injury be more than simply a "gradual deterioration or progressive degeneration."[96] Colorado, Florida, Idaho, Montana, and Washington have similar definitions which on their face require single events or sudden, traumatic occurrences in order for the injury to fall under workers' compensation.[97] However, some of these

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[92] *Fowler*, 589 So. 2d 670, 675 (Miss. 1991); *see* Pennington v. Smith, 100 So. 2d 569, 570 (1958) (cause accidental or effect unexpected satisfies definition of injury); *Byrd*, 60 So. 2d at 647 (recognizing injury caused by accident or result unexpected).

[93] *Fowler*, 589 So. 2d at 675.

> When an injury with physical results develops gradually from the work and cannot be traced to a single event or to a precise time the injury meets the requirement of accidental injury if it is causally connected to the work activities or environment and the events are "within a reasonably definite and not too remote period of time."

Id. (quoting Bradley, *supra* note 11, at 21).

[94] H.R. 837, 108th Leg., Reg. Sess., § 71-3-3 (1993).

[95] *Id.*

[96] LA. REV. STAT. ANN. § 23:1021 (West Supp. 1992). Alabama, Missouri and Nevada define accident as an "unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time *objective symptoms of an injury* [Alabama uses *injury to the physical structure of the body* . . .]." ALA. CODE § 25-5-1 (1992) (emphasis added); MO. ANN. STAT. § 287.020

(Vernon Supp. 1992) (emphasis added); NEV. REV. STAT. ANN. § 616.020 (Michie 1992) (emphasis added). Though all three states' statutes seem clear on their face, the courts in each state have rendered differed interpretations. Missouri takes the position that there must be an identifiable accident or unusual strain that causes the injury. Mason v. F.W. Strecker Transfer Co., 409 S.W.2d 267, 270 (Mo. Ct. App. 1966); *see* Schoessel v. Standard Auto Components, 539 S.W.2d 708, 710 (Mo. Ct. App. 1976) (holding pain alone without any event or cause not accident). This requirement precluded an injured worker from recovery under workers' compensation and forced him to seek a remedy in tort where he injured his back and could not show an "unusual strain" or an "unexpected or unforeseen event." Johnston v. Sol-Mor Garment Co., 51 S.W.2d 691, 693 n.1 (Mo. Ct. App. 1978). Alabama has simply concluded that an employee is not required "to prove the existence of some violent and unusual event that resulted in his or her injury." *Ex parte* Harris, 590 So. 2d 2856, 286 (Ala. 1991); *see* Kane v. South Cent. Bell Tel. Co., 386 So. 2d 3, 5 (Ala. 1979) (quoting City of Tuscaloosa v. Howard, 318 So. 2d 729, 732 (Ala. Civ. App. 1975)) (holding that accident occurred if result was unexpected and unforeseen). Apparently Alabama only requires that the job cause the injury. *Id.* Nevada seems to follow the same interpretation as Alabama and does not require that the employee pinpoint an exact cause or event producing the injury. State Indus. Ins. Sys. v. Neaver, 734 P.2d 740, 741 (Nev. 1987); *see* American Int'l Vacations v. MacBride, 661 P.2d 1301, 1301 (Nev. 1983) (holding that instantaneous injury is not required, only symptoms within reasonable time). One case in Nevada allowed the employee to sue the employer for failure to provide a safe place to work where a chest infection developed into systemic lupus erythematosus because the employer failed to properly heat the building. Smith v. Garside, 355 P.2d 849, 853 (Nev. 1960). The *Smith* court concluded that the injury did not result from an accident nor was it an occupational disease. *Id.*

[97] COLO. REV. STAT. § 8-41-108 (1986); FLA. STAT. ANN. § 440.02 (West 1991); IDAHO CODE § 72-102 (Supp. 1992); MONT. CODE ANN. § 39-71-119 (1991); WASH. REV. CODE ANN. § 51.08.100 (West 1990). Washington does not use a definition of *accident*, however, the statutes define *injury* similar to other states definition of accident. WASH. REV. CODE ANN. § 51.08.100 (West 1990). Washington statutes require a "sudden and tangible happening . . . producing an immediate or prompt result" in order for an injury to be covered by workers' compensation. *Id.* Therefore, similar to Louisiana, Washington courts have concluded that repetitive trauma does not create a compensable employment injury. Garret Freightlines v. Department of Labor & Indus., 725 P.2d 463, 468 (Wash. Ct. App. 1986). Colorado has taken somewhat of a middle ground by finding that an employee must show that the injury was caused by the employment. Martin Maretta Corp. v. Faulk, 407 P.2d 348, 349-50 (Colo. 1966). However, the Colorado courts have refused to find hearing loss caused by high levels of noise to be an accident compensable under workers' compensation. Martinez v. Industry Comm'n, 580 P.2d 36, 39 (Colo. 1978). However, it is pertinent to note the injury, although not covered by the definition of *accident*, was covered under *occupational disease*. *Id.* Florida, Idaho and Montana, though the definitions seem to be restrictive to iden-

states have allowed cumulative injuries, while others interpret the statute much more strictly.[98] With the exception of North Carolina, which looks to the cause of the injury rather than the result, the remaining states have definitions and court interpretations similar to the one currently in effect in Mississippi.[99] The requirement that the injury be more than simply a "gradual deterioration or progressive degeneration" sets the Louisiana definition apart from those used by Alabama, Missouri and Nevada.[100] Thus, an in-depth inquiry into the effect of this definition on injured workers in Louisiana is appropriate. Since Louisiana adopted the statute in 1989, cases construing the new amendment are scarce. The most recent reported case in Louisiana dealing with this definition is in *Dyson v. State Employees Group Benefits Program.*[101] After standing all day at a copier, the claimant in *Dyson* began complaining of "shooting" pains in her feet when she pivoted to pick up copies.[102] An orthopedic surgeon diagnosed her

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tifiable events, generally hold that cumulative events causing a single injury fall under the definition of accident and are compensable. *See* Worden v. Pratt & Whitney Aircraft, 256 So. 2d 209, 210 (Fla. 1971) (holding injury accidental even if caused by cumulative effect of events as opposed to single or sudden event); Victor Wine & Liquor, Inc., v. Beasley, 141 So. 2d 581, 588 (Fla. 1962) (holding internal bodily failure brought on by normal job related exertion is accident and no particular incident need be shown); Wynn v. J.R. Simplot Co, 666 P.2d 629, 631 (Idaho 1983) (finding that event need not be pinpointed that caused injury but only that employee engaged in job and suffered injury at that particular time and place); Hoehne v. Granite Lumber Co., 615 P.2d 863, 866 (Mont. 1980) (although tangible happening required allowed event or chain of events to qualify as accident and ruled injury compensable).

[98] *See supra* note 97.

[99] N.C. GEN. STAT. § 97-2 (Michie 1991); *see* 4 ARTHUR LARSON, THE LAW OF WORKMENS' COMPENSATION app. A, tbl. 2 (1992) (compiling all states' definitions of *accident* and *injury* and listing corresponding code sections). North Carolina, unlike most states, requires that to be compensable the injury must result from an accident which is separate from and preceding the injury. Beamon v. Stop & Shop Grocery, 219 S.E.2d 508, 509 (N.C. 1975). North Carolina goes even further to state that "[t]he word *accident* . . . shall not be construed to mean a series of events in employment . . . ." N.C. GEN. STAT. § 97-52 (Michie 1991).

[100] *See supra* note 96 and accompanying text.

[101] 1992 WL 358370 (La. Ct. App. 1st Cir. Nov. 20, 1992).

[102] *Dyson*, 1992 WL 358370, at *1. On the date of the accident, the claimant picked up unusually large stacks of copies. *Id.* She testified that it was not the weight of the stacks causing the problem, but that it was the turning and pivot-

problem as plantar fasciitis, an inflammation in the heel area, common in flat-footed, overweight persons who stand for long periods of time.[103] The State argued that the inflammation was a gradual or progressive degeneration which the legislature intended to exclude from workers' compensation coverage.[104] The court found that the claimant identified an event, the pivoting motion, which caused the pain, thereby marking the time the accident occurred.[105] Therefore, the court held that the claimant was entitled to workers' compensation benefits.[106] Compare *Dyson* to *Smith v. UNR Home Products*,[107] where a workers' compensation claimant argued that lifting sink molds in the course of his employment caused his back injury.[108] The claimant was unable to pinpoint the exact event which caused his pain to begin, and therefore, "failed to prove that whatever disability he may have suffered was the result of an event happening suddenly or violently as opposed to a gradual deterioration or progressive degeneration."[109] In

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ing alone. *Id.*

[103] *Id.* The doctor stated that plantar fasciitis is a "cumulative trauma disorder that is non-apparent until sufficiently aggravated by, for example, prolonged standing when it becomes apparent by pain." *Id.*

[104] *Id.* at *2. The State relied on the argument that no actual, identifiable, or precipitous event occurred to cause her condition. *Id.* The State further contended that the sharp pain was "insufficient, alone, to constitute an accident because in every gradual, progressive infirmity there must be some point at which the full-blown condition manifests itself." *Id.* The court dismissed this argument as "wholly lacking in merit." *Id.*

[105] *Id.* at *3. The court acknowledged that her injury appeared to be a gradual deterioration or progressive degeneration, nevertheless, she proved the requisite event relating to her work which caused the injury. *Id.*

[106] *Id.* The court made it clear that a claimant must identify an event which caused the accident. *Id.*

[107] 607 So. 2d 898 (La. Ct. App. 1992).

[108] *Smith*, 607 So. 2d at 899. The claimant injured his back on Friday, but failed to notify his supervisor that he had a backache and intended to seek medical advice the following Monday. *Id.* Six days after the alleged injury, the claimant notified UNR that the accident resulting in his injury was work-related. *Id.* In the claimant's testimony during the pre-trial deposition, he stated that the back problems gradually appeared, but at trial he testified that the pain occurred on one specific day. *Id.* at 900.

[109] *Id.* at 901-02. The court noted that there was not one scintilla of medical evidence offered to substantiate either the injury or that it resulted from a single event. *Id.* at 903. The court reiterated that proof of an injury, as opposed to a degeneration or deterioration, requires expert medical testimony. *Id.* at 903 n.4;

Fowler, the Mississippi Supreme Court noted that the "definition, by referring to 'event or events' retains the rule that a gradually developing injury is an accidental injury."[110] In contrast, the new statute deletes the term *events*, and it specifically states that worker's compensation shall not cover progressive or degenerative injuries. Because the legislature clearly altered the definition, our court likely will compare a case like *Fowler* to the two Louisiana cases of *Dyson* and *Smith*. As a result of this comparison and the requirement that an "identifiable, precipitous event"[111] cause the injury, a case such as *Fowler* may be a non-compensable injury.[112]

The current definition of injury covers any injury or physical change in the body as long as the cause can be traced to the employment.[113] The stringent requirements in the proposed amendment could limit coverage for mental injuries such as headaches or insomnia, since an objective finding of injury would be a difficult, if not an impossible standard to meet.[114] Furthermore, the proposed definition of accident may preclude workers' compensation benefits for gradually developing injuries, which cannot be traced to a single event. Examples of these injuries are exposure to harmful chemicals,

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see Hernandez, 555 So. 2d at 1021 (expert medical testimony generally required).

[110] *Fowler*, 589 So. 2d at 675 (quoting Bradley, *supra* note 11, at 14). As previously stated, the proposed definition of injury drops the use of the plural term *events*. H.R. 837, 108th Leg., Reg. Sess., § 71-3-3 (1993).

[111] H.R. 837, 108th Leg., Reg. Sess., § 71-3-3 (1993). In addition to the requirement that the event causing the injury must be identifiable, the proposal also requires objective findings of an injury. *Id.*

[112] *See supra* notes 68-72 and accompanying text.

[113] Bradley, *supra* note 11, at 13.

> Although the [current definition of injury] purports to describe what type of harm is regarded as a work injury it appears to accept the idea that any harmful change in the human organism is an injury so long as there is a causal connection to the work.

Id. The court generally must rely on a substantive analysis of the injury based on the expert's testimony especially in cases where no objective findings of an injury are possible. *Id.*

[114] *See* Marynell Lapuyade Piglia, Comment, *The 1989 Amendments to Louisiana Worker's Compensation Act: The Legislature's Attempt to Reinstate - or Retip - the Careful Balance of Interests Upset by Judicial Interpretations*, 36 LOY. L. REV. 158, 165 (1990) (discussing Louisiana's amendment in detail).

back problems resulting from heavy lifting, hearing loss due to exposure to excessive noises, and repetitive motion disorders. Many workers will not have a remedy under this amendment. If the worker is able to demonstrate that the injury was not within the scope of workers' compensation, he may still have a common law action.[115]

The issue, which Louisiana has not yet addressed, is whether an injury which fails to meet the definition of accident precludes common law actions. One theory the court could adopt is that the proposed definition simply mandates that the claimant meet a stricter burden of proof in order to obtain compensation for the injury. This theory is very persuasive insofar as mental injuries and heart-related injuries are concerned. The statute implies that these injuries are covered, but only if the applicable standard of proof is met. Thus, a claimant who suffered an undisputed mental injury allegedly caused by mental stress may find himself without any type of compensation unless he can demonstrate by clear and convincing evidence that the stress was employment related. However, this heightened proof theory is difficult to accept when the definition of accident comes into play. For example, in *Sonford Products Corp. v. Freels*,[116] the wife of a deceased employee of Sonford Products sought compensation for her husband's death due to prolonged exposure to pentachlorophenol.[117] Under the current definition, an injury such as this is compensable because the cause of death resulted from exposure to chemicals over a period of time. Under the proposed definition of accident and the interpretation of the Louisiana courts, the deceased would have to show that a single event caused the accident; in this case there was no such event. Thus, under the heightened proof analysis, this employee would find himself with no recovery for an injury allegedly caused by the conditions in the workplace culminating over a period of time.

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[115] The basis of this analysis is the conclusion that the court will allow the two part test explained in *Miller* to apply to injuries other than those caused by the wilful act of another within the scope of employment. Though the *Miller* decision has applied only to wilful torts in prior decisions, there is a possibility the court will expand the exception by focusing on whether the type of injury sustained is within the scope of the proposed definition of accidental injury. The *Miller* court stated that "the legislature intended for the Workmen's Compensation Act to be the exclusive remedy available to an employee *whose injuries fall within the purview of the act.*" *Miller*, 444 So. 2d at 370 (emphasis added).

[116] 495 So. 2d 468 (Miss. 1986).

[117] *Freels*, 495 So. 2d at 470. Pentachlorophenol is part of a process used to preserve wood. *Id.* The decedent's duties included mixing a dusty bead-like substance into an oil substance. *Id.* As a result of this the deceased inhaled the dust and his exposed skin was covered by the substance on a daily basis. *Id.* The Occupational Safety and Health Administration inspected the plant in 1980, almost eight years after the deceased began work, and subsequently required workers to

The court could choose to follow another theory based on the type of injury. The proposed definition of accident covers only the type of injury caused by an identifiable event. Because this injury resulted from a culmination of events, the daily exposure to chemicals, then the injury falls outside the coverage of workers' compensation. Therefore, if the type of injury is not covered by the definition of accident and the court follows *Miller*, then the exclusivity clause may not preclude other remedies. If the court broadly interprets the two requirements set forth in *Miller*, so that they apply to any type of injury not compensable under workers' compensation, then the deceased wife in *Freels* may have an action in tort against Sonford Products. The result would be an allegation that Sonford Products caused her husband's death by wilfully exposing its workers to the chemical while possessing knowledge of its danger. The claimant in a case such as this could advance the claim of recklessness and negligence under theories of failure to provide a safe place to work,[118] failure to furnish safe tools and equipment,[119] failure to warn of dangers,[120] and failure to promulgate and enforce work rules re-

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wear hoods, gloves, protective suits and vapor masks. *Id.* The issue in this case was whether or not the claimant established medical causation, not whether it was an accidental injury. *Id.* at 473-74. The court ruled there was a "reasonable basis to conclude that the exposure to chemicals at his work place was a substantial factor in bringing about Freel's death" and remanded the case for further proceedings. *Id.* at 473.

[118] *See supra* notes 17, 21, 24-25, 29, 36 and accompanying text.

[119] *See supra* notes 17, 22-25, 29 and accompanying text.

[120] *See supra* notes 17, 33 and accompanying text.

lating to conduct.[121]

V. CONCLUSION

The goal of workers' compensation is to insure that the injured worker does not become a burden on society as a result of those injuries.[122] Thus, workers' compensation strikes a balance between the employee and employer by insuring payment to the worker for an injury regardless of fault and protecting the employer from high damage awards.[123] Most of the proposed changes to the definition of *injury* will increase only the burden of proof required. However, the change in the definition of *accident* may upset this balance and open employers to common law suits in tort.[124] The most likely circumstance in which this will occur is where the employer exposes the employee to chemicals or hazardous substances. It is difficult to ascertain whether the court will require that the employer have knowledge of the danger. It is possible that the employee will be able to sue in tort if the employer's knowledge is demonstrated, thereby satisfying the requirements in *Miller*. Employers must be aware of the danger of exposure to tort liability of the pre-workers' compensation nature.[125] If an employee sues under one of the tort theories,[126] the employer is without most common law defenses.[127] The court is likely to construe the new definition strictly because the changes are such a radical departure from the prior definition. Because of this, the court may feel compelled to expand the exception in *Miller* to include acts other than wilful injuries.[128] The court may broaden the test under the premise that failure to allow the employee to recover defeats the goal of workers' compensation. The possibilities presented here are viable options the court may pursue in response to the several difficult questions this legislation presents. The legislature, employers, and the insurance industry should consider these possibilities before Mississippi makes fundamental changes.

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[121] *See supra* notes 17, 31 and accompanying text.

[122] Hopkins, *supra* note 7, at 228. To achieve this goal the employer is the insurer, regardless of negligence or fault, of all his employees. *Id.* The purpose of workers' compensation is to promote the welfare of workers within the state of Mississippi. MISS. CODE ANN. § 71-3-1 (Supp. 1992).

[123] DUNN, *supra* note 10, at §2. The act placed reasonable limitations on the benefits the worker would receive. Hopkins, *supra* note 7, at 228.

[124] *See supra* notes 16-47 and accompanying text.

[125] *See supra* notes 16-47 and accompanying text.

[126] *See supra* notes 118-121 and accompanying text.

[127] *See supra* notes 19-20, 29-34, 37-38, 40-47 and accompanying text.

[128] *See supra* notes 76-81, 86-87 and accompanying text.

Clark Monroe

THE "DIRECT THREAT" APPROACH TO THE HIV-POSITIVE HEALTH CARE EMPLOYEE UNDER THE ADA

> Isolation for those of us who are positive can be overwhelming. Yet, how can we speak when our very existence is threatened?[1]
>
> *An HIV-positive dentist*

> [T]his is a patients' rights matter, not a civil rights matter. Why take a chance? Why play Russian roulette with the patient population? . . . .To hint we have some sort of AIDS phobia is ridiculous.[2]
>
> *Barry Bowman, spokesman for Westchester County Medical Center*

I. INTRODUCTION

The 1990s will see an America suffering from the broadening impact of AIDS (Acquired Immune Deficiency Syndrome).[3] While AIDS redefined personal sexual behavior in the

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[1] Benjamin Schatz, *"May God and the Community Help Us All": Results of a Survey of HIV-Positive and "High-Risk" Untested Health-Care Workers*, 7 AIDS & PUB. POL'Y J. 71, 71 (1992). Mr. Schatz is the Executive Director of the Medical Expertise Retention Program, which is a national program for HIV-infected health care workers sponsored by the American Association of Physicians for Human Rights located in San Francisco, California. *Id.*

[2] *HHS Finds Against Westchester Hospital; Would Withhold $107 Million in Funding*, AIDS POL'Y & L., April 30, 1992, at 1, 10 [hereinafter *Westchester Hospital*]. Mr. Bowman referred to Westchester's "compassionate view of HIV" and their leading role in providing medical and dental care to HIV-infected individuals. *Id.*

[3] *AIDS, by Definition, Will Soon Get Worse*, U.S. NEWS & WORLD REP., January 11, 1993, at 9. By adopting a more inclusive definition of AIDS, the Centers for Disease Control and Prevention (CDC) doubled the previous number of reported AIDS cases to at least 90,000. *Id.* The previous definition excluded symptoms of the disease unique to women and intravenous drug users. *Id.* Besides adding several new diseases to the overall definition, the CDC also created a new AIDS indicator that is based on a drop in the level of a patient's master immune cells

1980s, the exponential growth of HIV (Human Immunodeficiency Virus) infection[4] and AIDS[5] inevitably will force Americans

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to about one fifth the usual level. *Id.* Furthermore, the expanded AIDS population will increasingly burden health clinics that are not used to dealing with the disease. *Id.* Due to the severity of the problem, President Bill Clinton is expected to increase AIDS funding beyond its current level of approximately $2 billion annually. *Id.* The impact of AIDS will be felt worldwide. Robert F. Black et al., *The Hidden Cost of AIDS*, U.S. NEWS & WORLD REP., July 27, 1992, at 49, 49-50. Experts predict that between 30 million and 110 million people will carry HIV by the year 2000, up from 12 million today. *Id.* In addition to the human cost between of $356 to $514 billion could be siphoned off the worldwide economy by the year 2000. *Id.* at 50. Based upon the estimate of $514 billion, there would be a loss of 1.4% of the world's gross domestic product. *Id.* In the United States, estimates of AIDS' cost by the year 2000 run between $81 billion and $107 billion. *Id.* Such costs reflect a growing HIV-positive population in America that currently numbers 1 in 250. Chris Carmody, *HIV-Stricken Lawyer Tries to Educate*, NAT'L L.J., January 11, 1993, at 8.

[4] Black, *supra* note 3, at 50. Though HIV infection rates today number between 10 million to 11.8 million, the World Health Organization and Global AIDS Policy Coalition estimate the numbers will rise to between 30 million and 110 million carriers. *Id.* HIV, named Human T-lymphotropic Virus, Type III, attacks several types of cells in the body's immune system negating the body's ability to fight off disease by destroying helper T cells. Jana Howard Carey & Megan M. Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284, 287 (1987). The loss of helper T cells leaves the infected person more vulnerable to opportunistic infections and cancers that make up the clinical syndrome known as AIDS. *Id.* Although HIV is present in minuscule amounts in many bodily fluids, the virus is transmitted primarily through semen, vaginal secretions, and blood. Tracy Jackson Smith, *AIDS and the Law: Protecting the HIV-Infected Employee from Discrimination*, 57 TENN. L. REV. 539, 540 (1990). Although a theoretical risk remains, the virus can live for only a short time outside the body. *Id.* Thus, it cannot be transmitted by breathing, touching, or other casual contact. *Id.* While HIV infection and AIDS are often used synonymously by the general public, it is still questionable whether individuals that are HIV-positive will necessarily develop the fully symptomatic condition of AIDS. David C. Wyld & Sam D. Cappel, *AIDS—Related Dementia and the Treatment of AIDS-Affected Individuals Under Changing Employment Law*, 42 LAB. L.J. 204, 205 (1991). The CDC estimates that after a five-year period, somewhere between 20% to 30% of HIV-positive individuals will have contracted AIDS. *Id.* Furthermore, the CDC estimates the incubation period between HIV infection and full-blown AIDS to be 10 years and perhaps in unique cases 15 years. *Id.*

[5] Robert B. Fitzpatrick & E. Anne Benaroya, *Americans with Disabilities Act and AIDS*, 8 LAB. LAW. 249, 252 (1992). As of January 1992, the CDC had 206,392 reported cases of AIDS in the United States. *Id.* The popular definition of AIDS is composed of the following classifications: (1) the existence of AIDS antibodies so as to indicate exposure but not certainty as to the future progression of the virus; (2) the existence of the AIDS virus during an asymptomatic incubation period; (3) the development of symptoms associated with AIDS-related complex;

in this decade to confront the complex issue of AIDS in the workplace.[6] The reality of a rapidly growing population of both symptomatic and asymptomatic HIV-positive individuals who are capable participants in daily employment activity has challenged the popular misconception of AIDS as a death sentence requiring immediate withdrawal from society.[7]

The employment of HIV-positive individuals with AIDS has generated growing concern over occupational exposure and transmission.[8] However, from a social policy perspective, fears

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and (4) the development of fully symptomatic AIDS as indicated by the presence of opportunistic diseases. *Id.* at 250. Of these AIDS cases, the following figures represent a breakdown of different risk groups and their relation to the overall number: homosexual-bisexual males (58%); intravenous drug abusers (23%); homosexual male and IV drug users (6%); hemophilia-coagulation disorders (1%); heterosexual cases (6%); transfusion-blood components (2%); and other-undetermined (4%). Butch John, *AIDS in Mississippi*, THE CLARION-LEDGER (Jackson, Miss.), Sept. 27, 1992, at 1H. Mississippi has 1000 reported cases of AIDS and 2400 reported cases of HIV infection. *Id.* Mississippi is ranked number 25 in the nation with 7.8 AIDS cases per 100,000 population. *Id.*

[6] David B. Ritter & Ronald Turner, *AIDS: Employer Concerns and Options*, 38 LAB. L.J. 69, 67 (1987). AIDS in the employment context raises numerous issues: (1) how will the carrier's job performance be affected; (2) what is the risk of workplace transmission to both employees and customers; (3) does the placement of workplace restrictions on the AIDS-infected employee constitute unlawful disability discrimination; (4) what if any coverage of AIDS and its related conditions is there under the business' insurance and disability plans; (5) should there be HIV testing of employees in general or of certain suspected employees; (6) what disclosure and privacy rights pertain to the employee's medical records; and (7) do collective bargaining and unions have some role in an employer's decisions dealing with AIDS. *Id.*

[7] *Increasing Span of Disease Progression Said Having Major Impact on Work Policies*, AIDS POL'Y & L., December 12, 1990, at 1, 3 [hereinafter *Increasing Span*]. The New England Corporate Consortium for AIDS Education suggests all businesses should conduct AIDS training for employees in groups of less than 30 with active involvement by senior management. *Id.* Such training prevents total disruption of the workplace upon the first discovery of an AIDS-infected employee. *Id. See generally* Paul S. Greenlaw, *HIV Antibody Testing: Legal Considerations and Sound Hospital Policy*, 25 J. HEALTH & HOSP. L. 80, 81-83 (1992) (discussing both methods of treatment as well as issues of testing employees).

[8] Robert A. Kushen, Note, *Asymptomatic Infection with the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563, 564 n.4 (1987). Fear over transmission is such that 33% of employees questioned about AIDS in the workplace believed that employers should be allowed to fire workers with AIDS. *Id.*; *see also* Judith Jean Morrell, *AIDS and Cancer: Critical Employment Discrimination Issues*, 15 J. CORP. L. 849, 856 (1990) (stating employees fear sharing restrooms, cafeterias, and equipment with AIDS-infected workers). Fears

of workplace transmission typically have had little basis in fact; there have been no documented cases of HIV infection through casual contact in the workplace.[9]

In the health care industry, however, the threat of contact with contaminated blood, fluids, and body tissues—all primary modes of virus transfer—makes the fear of infection a legitimate concern.[10] This concern is due to not merely the presence of HIV-positive employees,[11] but also the performance of invasive procedures by such employees.[12] Increased apprehension results from a large number of needlesticks, phlebotomy procedures, laboratory testing, aggressive behavior among patients, and other accidental cases of blood contact.[13] Health care em-

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of workplace transmission may decrease if new research on HIV and AIDS proves true. Robert Root-Bernstein, *Rethinking Aids*, WALL ST. J., Mar. 17, 1993, at A14. Bernstein discusses in this article, as well as in his similarly titled book, that "HIV infection and AIDS will remain limited to specific geographic areas and risk groups identified at the beginning of the epidemic; gay men and more particularly an ever growing population of urban, drug addicted, poverty-ridden, malnourished, hopeless and medically deprived people." *Id.* His conclusion is supported by the National Research Council report that concluded that healthy, non-drug using people do not contract AIDS. *Id.* "The people who do get both HIV and AIDS have many additional immunosuppressive factors at work on them that predispose them to the disease." *Id.*

[9] Allard E. Dembe, *Issues Affecting the Compensability of AIDS Under Workers' Compensation Insurance*, 7 AIDS & PUB. POL'Y J. 99, 99 (1992). Through August 1991, the CDC had only confirmed 28 cases of occupational AIDS transmission, which is equivalent to less than 0.003% of all reported AIDS cases. *Id.*

[10] JAMA *Study Finds Blood Exposures in 30-Plus Percent of Surgeries*, AIDS POL'Y & L., April 3, 1991, at 3, 3 [hereinafter *Blood Exposures*]. In an AIDS clinic at Grady Memorial Hospital in Atlanta, studies demonstrated that blood contact rates were highest among surgeons at 18.6 contacts per 100 surgeries, compared with 3.6 for anesthesia staff, 2.7 for scrub staff, 2.4 for circulating staff, and 5.8 for other operating room personnel. *Id.*

[11] Schatz, *supra* note 1, at 71. According to CDC statistics, between 50,000 to 75,000 U.S. health care workers are HIV-positive, with physicians accounting for 7000 to 10,000 of that total. *Id.* As of September 1992, there were 32 documented and 69 possible cases of HIV transmission in the health care employment context. *HIV & Healthcare*, ACCOMMODATING DISABILITIES, November 1992, at 10 [hereinafter *HIV*].

[12] *See* Centers for Disease Control, *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, 40 MORBIDITY & MORTALITY WKLY. REP. July 12, 1991, at 9 (defining "invasive procedures").

[13] Dembe, *supra* note 9, at 99. Estimates indicate approximately 800,000 needlesticks occur annually in the U.S. health care industry. *Id.*

ployers must deal with both the refusal of healthy employees to work with AIDS carriers and the equally pressing demands of their customers—the health care patient.[14] In short, the HIV-positive health care worker is an attractive candidate for employment discrimination.

Standing in contrast to the misconceptions and fears of individual employers, however, is the Americans with Disabilities Act of 1990 (ADA), a landmark in civil rights legislation.[15] With the implementation of Title I of the ADA, private employers[16] are no longer allowed to discriminate against a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position for which the individual has applied or which he already occupies.[17] Although the statute does not expressly hold AIDS, AIDS-related complex, or HIV infection to be a "disability," the first prong of the ADA's statute's definition clearly encompasses all forms of the ADA's disabilities.[18] Furthermore, the statute's legislative history indicates a clear congressional intent to provide coverage for what is broadly termed the "HIV disease."[19] Courts have routinely held both symptomatic and asymptomatic HIV diseases as protected "handicaps"[20] for purposes of the Federal Rehabilitation Act of 1973.[21]

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[14] Joel Neugarten, *The Americans with Disabilities Act: Magic Bullet or Band-Aid for Patients and Health Care Workers Infected with the Human Immunodeficiency Virus?*, 57 BROOK. L. REV. 1277, 1299 (1992). Projections indicate that the risk of at least one annual occupational transmission for health care workers is close to 50% in large urban hospitals. *Id.* However, health care workers, who constitute only 5.7% of the U.S. workforce, account for only 5.4% of all reported AIDS cases, thus indicating the degree to which the fear of occupational transmission has been exaggerated in the popular imagination. *Id.* at 1299 n.96.

[15] 42 U.S.C. §§ 12101-12213 (Supp. II 1990). *See generally* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 454-64 (1991) (discussing general employment provisions of ADA); Thomas H. Christopher & Charles M. Rice, *The Americans with Disabilities Act: An Overview of the Employment Provisions*, 33 S. TEX. L.J. 759, 762-77 (1992) (providing thorough discussion of Title I's coverage); Arlene Mayerson, *Title I—Employment Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 499, 500-09 (1991) (stating changes in ADA and comparing ADA with predecessor Rehabilitation Act of 1973).

[16] 42 U.S.C. § 12111(5)(A). The ADA went into effect on July 26, 1992, with respect to employers who have 25 or more employees during 20 or more weeks of the current or preceding year. *Id.* On July 26, 1994, the threshold number of employees in order to activate coverage will be reduced to 15 or more employees. *Id.*

[17] *Id.* § 12111(8); *see* C. Geoffrey Weirich, *Reasonable Accommodation Under the Americans with Disabilities Act*, 7 LAB. LAW. 27, 28 (1991) (stating major difference between ADA and Rehabilitation Act involves inclusion of "essential functions in ADA").

[18] S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989), *reprinted in* EMPLOYER

Thus, with the certain inclusion of AIDS and AIDS-related diseases under the ADA, the focus of Title I's application to qualified HIV-positive health care workers is the requirement

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COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT, at 209 (1990). The Report specifically states that infection with the Human Immunodeficiency Virus constitutes a "physical or mental impairment" under the definition of disability. *Id.*

[19] *Id.* at 19. The Report included the recommendation of the Presidential Commission on the HIV Epidemic, which stated that "all persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation." *Id.*

[20] Patricia A. Curtis, Notes, *AIDS and Employment Discrimination: Should AIDS Be Considered a Handicap?*, 33 WAYNE L. REV. 1095, 1106-08 (1987); *see* Doe v. Attorney Gen., 941 F.2d 780, 795 (9th Cir. 1991) (holding that physician's procurement contract allowed him right of action against the Department of Justice and the FBI for AIDS discrimination); Severino v. North Fort Meyers Fire Control Dist., 935 F.2d 1179, 1183 (11th Cir. 1991) (holding that HIV-positive fireman had no right of action since he failed to accept reasonable accommodation offered); Glanz v. Vernick, 756 F. Supp. 632, 637 (D. Mass. 1991) (denying motion for summary judgment since clinic's practice was in part federally funded so as to prohibit its discrimination against AIDS patient who wanted surgery); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 379 (C.D. Cal. 1987) (holding that even asymptomatic AIDS patients fell under definition of handicapped); *see also* Cain v. Hyatt, 734 F. Supp. 671, 683 (E.D. Pa. 1990) (holding that Section 504 protected lawyer when firm dismissed him after testing HIV-positive); Ray v. School Dist., 666 F. Supp. 1524, 1536 (M.D. Fla. 1987) (granting preliminary injunction to bar segregation of HIV-positive students); Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50, 54 (D.D.C. 1987) (holding that HIV infection was perceived handicap under Section 504).

[21] 29 U.S.C. § 701-796 (Supp. V 1981). The Federal Rehabilitation Act is a handicap statute which provided much of the framework and guidance for the ADA's drafting and whose numerous interpretations will provide legal authority for the ADA. Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodations and Undue Hardship in Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1425 (1991); *see* Curtis, *supra* note 20, at 1099-1100 (discussing Rehabilitation Act as it related to AIDS); *see also Rehabilitation Act Now Looks More Like ADA*, ACCOMMODATING DISABILITIES, November 1992, at 4, 10 [hereinafter *Rehabilitation*] (discussing recent amendments to act). The Federal Rehabilitation Act was a handicap statute which provided much of the framework and guidance for the ADA's drafting and whose numerous interpretations will provide legal authority for the ADA.

of reasonable accommodation and the limiting factor of undue hardship.[22] Through an analysis of legislative history, corresponding federal regulations, and handicap discrimination cases, this comment will attempt to determine the relevant boundaries of these concepts, as well as employer defenses, within the health care context, in order to provide direction for health care businesses in dealing with an HIV-infected employee. Furthermore, this comment will offer suggestions to health care employers to assist in determining when and under what circumstances reasonable accommodation is required to avoid future litigation.

II. THE WORKPLACE RESPONSE TO HIV UNDER THE DIRECT THREAT DEFENSE

A. *An Overview*

Because fully symptomatic AIDS is an incurable and ultimately fatal disease and because the public remains uncertain of the possible modes of transmission, both discharge and restriction of HIV-positive employees are frequent employer responses to the concerns AIDS has sparked in the workplace.[23] However, an employer who responds only to "society's accumulated myths and fears about disability and disease,"[24] rather than statutory direction, may face expensive litigation and costly civil penalties.[25]

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[22] Kenneth E. Labowitz, *Refusal to Treat HIV-AIDS Patients: What Are the Legal Obligations?*, TRIAL, March 1992, at 58, 60. Labowitz notes that the health care industry should dispel the irrational fears surrounding AIDS or otherwise be prepared to face numerous patient cases. *Id.* at 61.

[23] *Increase in Rights Violations Noted Among HIV-Positive Professionals*, AIDS POL'Y & L., January 9, 1992, at 7 [hereinafter *Rights Violations*]. Employers have recently used their knowledge of workers' HIV status in order to pressure them into settling any legitimate claims for less than they are entitled to receive. *Id.*

[24] School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987). This landmark case first held that communicable diseases such as tuberculosis are protected handicaps. *Id.* at 289. The defendants dismissed the teacher on the basis of her contagious disease. *Id.* at 276. The Court ruled, however, that discrimination founded on fear of contagion was actionable under the Rehabilitation Act. *Id.* at 285-86.

[25] Christopher, *supra* note 15, at 798-99. A prevailing party is entitled to lost wages and benefits as well as equitable relief that will terminate the discrimina-

As noted, the ADA prohibits any employer from discriminating against an otherwise qualified employee on the basis of a disability.[26] Prohibited forms of discrimination include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status"[27] of the applicant or employee, as well as "not making reasonable accommodations to the known physical or mental limitation . . . unless . . . the accommodation would impose an undue hardship."[28]

Under more typical disability situations, reasonable accommodation would seem to require primary attention once discovery of the condition occurred.[29] However, the legislative history of the ADA reveals that "the duty to accommodate is generally triggered by a request from an employee or applicant" rather than by a concerned employer—whose unsolicited, independent acts could actually "impact adversely on the individual."[30] However, this can be problematic because the HIV-infected employee is often not sufficiently debilitated to warrant the potential negative effects of submitting a request for reasonable accommodation.[31] Nonetheless, the health care

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tory effects. *Id.* at 799. A showing of intentional discrimination will entitle the plaintiff to compensatory damages. *Id.* If malice and indifference are shown, the plaintiff can recover punitive damages. *Id.* The prevailing party can also recover court costs and attorney fees. *Id.*

[26] 42 U.S.C. § 12112(a). This prohibition specifically forbids discrimination in regard to "the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment." *Id. See* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (holding that "otherwise qualified" person is a person who is able to fulfill all program demands despite his handicap).42 U.S.C. § 12112(a).

[27] ADA § 12112(b)(1).

[28] *Id.* § 12112(b)(5)(A).

[29] Cooper, *supra* note 21, at 1459. The author noted that the ADA imposes on the employer not only a substantive duty to conduct a review of the work required, but also a procedural duty to consider issues of reasonable accommodation once the first request for such is made. *Id.*

[30] A concerned employer's unsolicited, independent acts could actually "impact adversely on the individual." S. REP. NO. 116, *supra* note 18, at 34; *see, e.g.*, Chalk v. United States Dist. Court, 840 F.2d 701, 712 (9th Cir. 1988) (holding that injunction which forced reinstatement of HIV-positive teacher to classroom was proper).

[31] Schatz, *supra* note 1, at 74-76. In a recent survey, 73% of HIV-positive health care workers feared losing their jobs. *Id.* Another 67% did not disclose

employer is not statutorily precluded from taking actions to ensure the safety of both healthy workers and patients, for the ADA provides employers an approach termed the "direct threat" defense.[32] Under the direct threat approach, the employer must first enter into a significant risk analysis before focusing on reasonable accommodation of the worker or restricting the employee's activities based merely on the fear of contagion.[33]

B. Application of the Significant Risk Analysis to the Health Care Industry

The ADA states that an employer cannot automatically limit the duties of a disabled employee without using one of the prescribed defenses as a basis.[34] In this regard, the ADA notes that job "qualification standards" may be used in defining the scope of an employee's duties in order to ensure the disabled individual does "not pose a direct threat to the health or safety of other individuals in the workplace."[35] According to the corresponding Senate Report, a person with a currently contagious disease constitutes a direct threat if that person poses a significant risk of transmitting the infection to others in the workplace which cannot be eliminated by reasonable accommodation."[36] In determining whether the employee would pose a direct threat, the EEOC has stated that courts should consider the duration of the risk, the nature and severity of the potential harm, the likelihood the harm will occur, and the imminence of the potential harm."[37]

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their HIV status for purposes of insurance benefits or for treatment, all because they feared losing their jobs. *Id.* As to their job performance capabilities, one respondent stated that a patient would be better protected from transmission of contagious diseases by using an HIV-positive physician, who would take extraordinary precautions to prevent transmission. *Id.*

[32] S. REP. NO. 116, *supra* note 18, at 40.

[33] 42 U.S.C. § 12113(b); *see Arline*, 480 U.S. at 287 n.16 (stating that school would not have to place teacher with active, contagious tuberculosis in classroom with pupils since teacher would constitute significant risk).

[34] 42 U.S.C. § 12113(b); *see* Weirich, *supra* note 17, at 35 (discussing generally available defenses).

[35] 42 U.S.C. 12113(b).

[36] S. REP. NO. 116, *supra* note 18, at 40.

[37] 29 C.F.R. § 1630.2(r) (1992). It should be noted that in determining wheth-

With this statutory focus on direct harm and significant risk, employers must approach HIV infection under a more stringent standard based upon objective, case-by-case factual analysis that avoids the generalizations and stereotypes of a speculation-based standard.[38] By failing to adhere to this individualized approach, health care employers seeking to restrict HIV-positive employees may take actions that are construed under the ADA to constitute employment discrimination.[39]

Though the risk of HIV transmission during exposure-prone procedures may be no greater than other tolerated risks in the health care setting, courts in pre-ADA cases have often accepted the mere existence of risk as a sufficient basis for restricting a health care worker's responsibilities.[40] In *Estate of Behringer v. Medical Center at Princeton*,[41] the New Jersey Superior Court, applying a "no risk" standard,[42] upheld the exclusion of an AIDS-infected surgeon from engaging in invasive procedures.[43] Upon learning of his disease, the

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er a significant risk exists, the Equal Employment Opportunity Commission requires that valid medical or other objective evidence point to a high probability of substantial harm to others. 29 C.F.R. app. § 1630.2(r) (1992); *see Arline*, 480 U.S. at 288 (establishing four factors as process for determining risk).

[38] 29 C.F.R. § 1630.2(r) (1992). "The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job." *Id.*

[39] 29 C.F.R. app. § 1630.2(r) (1992). "Generalized fears about risks from the employment environment . . . cannot be used by an employer to disqualify an individual with a disability." *Id.*

[40] Schatz, *supra* note 1, at 72-73. According to the CDC, the risk of HIV transmission from physician to patient during surgery is estimated to be 1 in 416,667. *Id.* at 72. The risk of HIV transmission during a dental procedure is 1 in 2,631,579. *Id.* at 73. In comparison, the risk of death from a pregnancy-related complication is estimated to be 1 in 15,385, while the risk of death from anesthesia is estimated to be 1 in 10,000. *Id.* The fact often ignored by courts is that the universal precautions instituted by the CDC have lowered dramatically the risk of transmission of other blood-borne pathogens, such as hepatitis B. *Id.* Furthermore, while the risk of hepatitis transmission following a prick by a needle, or a "needlestick," is 6% to 30%, the risk of HIV transmission is less than 1%. Gordon G. Keyes, *Health-Care Professionals with AIDS: The Risk of Transmission Balanced Against the Interests of Professionals and Institutions*, 16 J.C. & U.L. 589, 601 (1990).

[41] 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991).

[42] Neugarten, *supra* note 14, at 1326. The author indicated that the "no risk" standard is inconsistent with the CDC guidelines, which require individualized study of risk rather than some generalized assessment. *Id.*

[43] *Estate of Behringer*, 592 A.2d at 1283. The court noted that the restricted

hospital immediately suspended his surgical duties and subsequently formed a policy that allowed HIV-positive physicians to treat patients only in ways that posed no transmission risks.[44] Due to the fact that the physician's unrestricted practice would create a "reasonable probability of substantial harm" under New Jersey law, the court held the hospital's actions to be justified.[45] The court further stated that "where the ultimate harm is death, even the presence of a low risk of transmission justifies the adoption of a policy which precludes invasive procedures when there is 'any' risk of transmission."[46]

Although this case involved New Jersey law, the "no risk" standard employed by the court clearly violates the ADA's emphasis on an individualized finding of significant risk based on a variety of factors rather than the mere existence of some degree of risk.[47] In addition, the total exclusion of HIV-positive physicians from surgical procedures is questionable under current Centers for Disease Control (CDC) guidelines which recommend individualized study of such situations by a medical review board and the consistent use of universal precautions.[48]

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physician established a prima facie case of discrimination through the hospital's admission that it had suspended surgical duties based solely on the physician's condition of AIDS. *Id.* at 1276.

[44] *Id.* at 1259-60. HIV-positive physicians were also required to obtain written informed consent from a patient prior to the performance of surgery. *Id.* at 1260.

[45] *Id.* at 1283. The court recognized the fact that the hospital utilized experts and conducted vigorous debates over the issue. *Id.* The court stated that while the result reached was harsh to the plaintiff, it was one which was well-reasoned and fully informed. *Id.*

[46] *Id.*

[47] 29 C.F.R. app. § 1630.2(r) (1992). The EEOC notes that in considering significant risk the employer should seek "input from the individual . . . .and opinions of medical doctors . . . who have . . . direct knowledge of the individual with the disability." *Id. But see* Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1410 (5th Cir. 1983) (seeming to allow employers to evaluate disability merely on statistical risks when dealing in areas of "soft science").

[48] Centers for Disease Control, *supra* note 12, at 5. These guidelines further state that the review panel should include experts "who represent a balanced perspective." *Id.* A well- balanced panel would include the HIV-positive worker's physician, state public health officials, an infectious disease specialist with knowledge in the area of AIDS transmission, and a health care worker with knowledge of the daily procedures performed by the workers. *Id.* The CDC guidelines recommend individualized study of such situations by a medical review

Finally, by ignoring other comparable risks tolerated in the hospital environment, the court created a double standard for HIV-infected employees which would constitute unlawful discrimination under the ADA.[49]

While the *Behringer* decision held a low risk to be sufficient basis for practice restrictions, other courts have approached the risk of HIV contagion from a cumulative standpoint. In *In re: Application of Hershey Medical Center,*[50] the court stated that "[w]hen one . . . calculate[s] how many individuals may be subjected to the same risk by the same medical worker, multiplied by the aggregate of infected health care professionals, the numbers become staggering."[51]

While courts have often dealt with the question of significant risk in the context of HIV-infected physicians, the Fifth Circuit has addressed this question of significant risk in the context of a licensed practical nurse in *Leckelt v. Board of Commissioners of Hospital District No. 1.*[52] In this case, the court upheld the discharge of a nurse suspected of being HIV-positive who refused to submit his HIV test results to the hospital.[53] According to CDC guidelines, the nurse's duties of performing catheterizations, changing wound dressings, administering enemas, and starting intravenous lines constituted exposure-prone, invasive procedures.[54] Despite finding a low risk of transmission, the court ruled that the risk which the nurse would pose in the hospital setting—were he infected—was of sufficient significance to grant the employer an

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board and the consistent use of universal precautions.

[49] *Estate of Behringer*, 592 A.2d at 1279-80; *cf.* Strathie v. Dept.of Transp., 716 F.2d 227, 232 (3d Cir. 1983). In *Strathie*, the department attempted to exclude bus drivers who wore hearing aids on the basis that the devices might become dislodged while the driver operated his bus. *Id.* However, the policy created a double standard since the department did not have the same restriction for those who wore eyeglasses, which could also become dislodged. *Id.*

[50] 595 A.2d 1290 (Pa. Super. Ct. 1991).

[51] *Hershey*, 595 A.2d at 1296. The court stated that "it is no consolation to the one or two individuals who become infected . . . that they were part of a rare statistic." *Id.*

[52] 714 F. Supp. 1377 (E.D. La. 1989), *aff'd*, 909 F.2d 820 (5th Cir. 1990).

[53] *Leckelt*, 714 F. Supp. at 1384-85. The hospital's concern stemmed from the AIDS infection of the plaintiff's roommate. *Id.* at 1384.

[54] *Id.* at 1382.

interest in monitoring the nurse's HIV status.[55]

Because the CDC guidelines have changed so as to reclassify the nurse's duties as non-exposure-prone, the facts of *Leckelt* would most likely not constitute a significant risk.[56] However, the employer could still seek restrictions or discharge based on the nurse's failure to comply consistently with universal precautions.[57] The *Leckelt* court held that such noncompliance denied the HIV-infected employee the "otherwise qualified" status necessary for protection under the ADA.[58]

However, increased knowledge of AIDS has resulted in court decisions more favorable to the HIV-positive health care employee. In *In re Westchester County Medical Center*,[59] an administrative law judge ruled that there is no significant risk that a hospital pharmacist will transmit HIV to patients in the course of his duties.[60] As a result,, the hospital could not restrict him from preparing intravenous materials in order to protect others from transmission of the virus.[61] In making its individualized determination, the court held that such concerns were "mere speculation, unsupported by credible evidence that there is any risk that [transmission] would happen."[62]

Though past cases allowing the placement of practice restrictions on HIV-positive physicians may be inconsistent with the analysis under the ADA,[63] the nonconformity of these cases does not indicate that it is impossible to lawfully exclude an infected employee from performance of exposure-prone procedures.[64] Rather, if courts determine that HIV-infected health care workers present a significant risk of transmission, then the employer must consider whether any reasonable accommodation would lower the risk to an acceptable level.[65] In the health care context, the CDC has concluded that workers who perform non-exposure-prone procedures and who comply with universal precautions do not pose a significant risk and thus do not require a reasonable accommodation inquiry.[66] However, where the HIV-infected health care worker performs exposure-prone procedures, the CDC guidelines view the worker as a significant risk requiring a reasonable accommodation inquiry.[67]

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[55] *Id.* at 1390-91. The court noted that the "defendants had a legitimate and non-discriminatory reason for discharging the plaintiff." *Id.* at 1389.

[56] Neugarten, *supra* note 14, at 1331. The CDC defines "exposure-prone procedures" as the "digital palpation of a needle in a cavity or the simultaneous presence of the [health care worker's] fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomic site." Centers for Disease Control, *supra* note 12, at 4.

[57] Centers for Disease Control, *supra* note 12, at 5. "Universal precautions" consist of "the appropriate use of hand washing, protective barriers, and care in the use and disposal of needles and other sharp instruments." *Id.*

[58] *Leckelt*, 714 F. Supp. at 1387. The nurse in this case failed to comply with the hospital's infection control policies. *Id.*

[59] No. 91-504-2 (Dep't HHS App. Bd. April 20, 1992).

[60] *Westchester Hospital*, *supra* note 2, at 9. The hospital claimed that the plaintiff could possibly contaminate injectable products with his own blood or other bodily fluids. *Id.*

[61] *Id.* By restricting him, the hospital forced the pharmacist to work a certain time slot during which another person could perform those restricted tasks. *Id.* However, this time period resulted in lower earnings than the shift for which he had applied. *Id.*

[62] *Id.*

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[63] *See supra* notes 40-49 and accompanying text.

[64] Neugarten, *supra* note 14, at 1332-33 exclusion of surgeons from exposure-prone procedures depends on a court's finding of significant risk. *Id.*

[65] 29 C.F.R. § 1630.2(r) (1992). The question of what is an acceptable level of risk involves more than just a consideration of statistics. Edward P. Richards, *The Risks Every Business Should Know About AIDS and HIV Infection*, HEALTH LAW., Fall 1992, at 11, 14. The author notes that until federal courts determine whether the ADA preempts state tort claims, an employer might be subject to differing standards of risk. *Id.* For example, if the proof of significant risk under the ADA requires 75% certainty of risk of injury to people in the workplace, whereas a state tort claim under a theory of negligent hiring or retention only requires 50% chance of risk in order to convince a jury, then an employer who finds a 60% chance of risk faces the possibility of being either successfully sued for excluding or not excluding that employee from the workplace. *Id.*

[66] Neugarten, *supra* note 14, at 1332-33. However, reports indicate that many infected health care workers ignore the universal precautions provided by the CDC. Bruce L. Ottley & Marguerite N. Conboy, *A Reasonable Probability of Substantial Harm?: Health Care Workers, AIDS, and the Duty to Disclose*, 25 J. HEALTH & HOSP. L. 65, 68 (1992). These workers justify their lack of precautions on the basis of the low transmission risk and fear that use of precautions might alert others to their condition. *Id.*

[67] *See supra* note 64 and accompanying text.

C. Reasonably Accommodating the HIV-Positive Health Care Worker Who Poses a Significant Risk

In dealing with the question of reasonable accommodation in *School Board of Nassau County v. Arline*,[68] the Supreme Court stated that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."[69] In deciding whether a reasonable accommodation is possible for the HIV-positive employee, the health care business should examine the modes of HIV transmission, the duration of the risk, the amount of risk to other healthy individuals, and the likelihood of occupational transmission.[70] As noted previously, the HIV-infected health care workers who will most likely require reasonable accommodation are those involved in exposure-prone procedures.[71] To avoid subsequent litigation, employers must explore objectively, on a case-by-case basis, the possibility of reasonable accommodation before assuming the employee is unqualified to perform his job.[72]

Though the reasonable accommodation requirement has been suggested to be the equivalent of affirmative action, decisions in such cases have noted that the employer is under no obligation to lower its standards or modify the job requirements in order to hire an HIV-infected employee not "otherwise qualified" for the job.[73] In fact, the health care employer has only "an affirmative obligation to make a reasonable accommodation for a handicapped employee."[74]

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[68] 480 U.S. 273 (1987).

[69] *Arline*, 480 U.S. at 287 n.16.

[70] *Id.* at 288. This four-step process was suggested to the Supreme Court by the American Medical Association's *Amicus Curiae* Brief. *Id.*

[71] *See supra* note 67 and accompanying text.

[72] Weirich, *supra* note 17, at 29. The employer should compare relative qualifications by assuming that all reasonable accommodations will be supplied to a disabled applicant. *Id.* at 28.

[73] *Strathie*, 716 F.2d at 231. To modify the essential nature of the program in order to accommodate an individual would be unreasonable. *Id.*

[74] *Arline*, 480 U.S. at 289 n.19. The court stated that an employer is not

In providing the accommodation, the employer need not supply the best accommodation possible; the accommodation simply must meet sufficiently the job-related needs of the employee.[75] Though the ADA does not require that an HIV-positive individual accept the provided accommodation, such employees may only avoid those accommodations that are disguised forms of discrimination.[76] Thus, this provision would not allow an HIV-infected health care worker to ignore the practice restrictions and job restructuring which has been determined through the reasonable accommodation process to reduce the predetermined significant risk to an acceptable level.[77] Instead, the worker who fails to comply in this instance would be considered unqualified for purposes of the ADA.[78]

When an HIV-positive health care worker poses a significant risk, job restructuring is possibly the employer's most practical method of reasonable accommodation available to reduce or eliminate the risk.[79] Typically, job restructuring involves the reallocation or redistribution of nonessential, marginal job functions.[80] Job restructuring may also require alter-

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required to provide another job for a disabled employee who is unqualified for the job he previously held. *Id.* However, the employer cannot deny alternative employment to the disabled worker if that job is reasonable under the current workplace policies. *Id.* H. R. REP. NO. 485, 101st Cong., 2d Sess. 56 (1990), *reprinted in* EMPLOYER COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT, at 352 (1990). The Report states that an employer does not have to prefer applicants with disabilities over those who do not have disabilities. *Id.* This proves to be an essential distinction between reasonable accommodation and affirmative action. *Id.*

[75] *See* Carter v. Bennett, 840 F.2d 63, 68 (D.C. Cir. 1988). In this case, the Department of Education did adequately accommodated a blind employee enabling him to carry out the essential functions of his job. *Id.* Though plaintiff requested additional accommodations, such as a voice synthesized computer and two floppy disc drives, neither were necessary for adequate job performance. *Id.*; *see also* Alexander v. Choate, 469 U.S. 287, 300 n.20 (1985) (holding Rehabilitation Act did not require significant program alteration); Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979) (holding that nursing program did not have to lower standards to accommodate hearing impaired).

[76] 29 C.F.R. § 1630.9(d) (1992).

[77] *Id.*

[78] *Id.*

[79] Weirich, *supra* note 17, at 29. The author states that the "key to job restructuring is a willingness to be flexible." *Id.* Job restructuring is an accommodation method that is popular due to its ability to deal with impairments. *Id.*

[80] 29 C.F.R. app. § 1630.2(o) (1992); *see also* S. REP. NO. 116, *supra* note 18,

ation in when and how an essential function is performed.[81] However, job restructuring does not require the reallocation of a job's essential functions since these are duties an HIV-infected worker must perform with or without a reasonable accommodation to be considered qualified.[82] In carrying out this process, the health care employer should maintain communication with the employee, so as to best determine what restrictions and accommodations need to be made.[83]

Clearly, a key question in deciding whether the health care business must restructure an HIV-infected employee's duties is the determination of the essential functions of the job.[84] While stating that the reasonable accommodation must enable the worker to carry out the essential functions of the job, the regulations do not indicate what would constitute an essential function.[85] In this regard, health care employers will be given some deference in determining the essential functions of particular

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at 31 (discussing job restructuring).

[81] 29 C.F.R. app. § 1630.2(o) (1992). For example, in order to accommodate one whose disability inhibited his/her ability to write, a business could convert the manual record keeping system to a computerized system. *Id.*

[82] *Id.* The regulations note that for a security guard position whose chief function is to look at identification cards, an employer would not have to provide a blind person an assistant in order to accomplish that task for the blind employee. *Id.* In this case, the assistant would not be assisting but performing the essential function. *Id.*

[83] *Id.* It is important to remember that the ADA requires not only this interactive process but also the posting of notices in accessible areas in the workplace. ADA § 12115. These notices will help acquaint employees of the applicable provisions of this act. *Id.*

[84] 29 C.F.R. app. § 1630.2(n) (1992).

[85] 29 C.F.R. app. § 1630.2(n)(2) (1992). Three factors are to be considered in determining whether or not the job function is marginal or essential to the position. *Id.* The first is whether or not the position exists to perform a particular function. *Id.* The second is the number of other employees available to perform that job function or the availability of other employees among whom the performance of that job function can be distributed. *Id.* The third factor is the degree of expertise or skill required to perform the function. *Id.*; *see* Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983) (determining under second factor that too few workers could perform plaintiff's work in addition to their own work so as to be unreasonable); Davis v. Frank, 711 F. Supp. 447, 454 (N.D. Ill. 1989) (holding that postal service could restructure time and attendance clerk position to allow deaf plaintiff to perform essential functions); Dexler v. Tisch, 660 F. Supp. 1418, 1428 (D. Conn. 1987) (holding that restructuring of postal job for dwarf involved unreasonable accommodation).

positions.[86] While employers should determine formally what job tasks are essential, it is important to note that final determination of this question rests with the courts.[87]

Though practice restrictions may render an HIV-infected surgeon incapable of performing the essential functions of his position, courts have tended to use the reasonable accommodation process to allow the physician to continue performing some essential functions while allowing the hospital to bar the physician from engaging in those essential functions in which a significant risk cannot be reduced or eliminated.[88] In *Doe v. Cook County*,[89] a neurologist with AIDS was barred from all clinical privileges by the hospital advisory board.[90] In the resulting suit, the court restored most of the physician's responsibilities except those dealing with muscle and nerve biopsies and cerebral angiographies.[91] However, he was required to double glove for all other invasive procedures and examinations of body cavities.[92] The court stated that the hospital had "'to reasonably accommodate [the physician's] . . . physical and mental limitations by modifying . . . his duties and responsibilities . . . to permit him to continue to engage in as many of his job duties as he [could] competently perform.'"[93] However, using the three-factor test provided in corresponding regulations,[94] and facing an inability to reduce the risk through reasonable accommodations, an employer could possibly restrict all essential functions of a health care worker with AIDS. Such restrictions would render the worker unqualified for the position, and for receipt of accommodation under the ADA.[95]

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[86] *See* 29 C.F.R. app. § 1630.2(n) (1992).

[87] Cooper, *supra* note 29, at 1443. The author expresses reservations about the formal drafting of essential functions for particular jobs. *Id.* at 1442. His concern is that employers may draft the requirements so that a disabled individual cannot qualify. *Id.*

[88] Schatz, *supra* note 1, at 77. The restriction of one or two health care worker duties may be enough to eliminate all essential job functions, especially where such duties were the basis of the hiring. *Id.*

[89] No. 87-C 6888 (N.D. Ill. Feb. 24, 1988).

[90] Neugarten, *supra* note 14, at 1328-29.

[91] *Id.* at 1329 & n.260.

[92] *Id.* at 1329.

[93] *Id.*

[94] *See supra* note 85 and accompanying text.

[95] *See supra* note 88 and accompanying text. *See generally* Barry S. Reed,

Although reasonable accommodation might be impossible for the employee's original position, the ADA seems to require an employer to reassign an HIV-positive employee to another vacant position if the reassignment will not impose undue hardship.[96] Under this form of reasonable accommodation,[97] an employer should attempt to reassign the worker to a position which is equivalent in terms of pay and status, so long as the person is qualified.[98] Absent an equivalent position, the employer can reassign that employee to a lower-grade position.[99] However, the necessity of job reassignment often depends upon the significant risk determination. In *Chalk v. United States District Court*,[100] a teacher with AIDS was reassigned to a position involving no contact with students.[101] In holding that the teacher had suffered discrimination, the court found reassignment was unnecessary since the teacher posed no significant risk in the prior position and was otherwise qualified.[102] Similarly, the *Westchester* case held that reassign-

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Testing Health Care Workers for AIDS, 8 J. CONTEMP. HEALTH L. & POL'Y 237, 240-41 (1992) (noting that even exposure-prone procedures involve almost no risk so as to call into question presumption of significant risk in these procedures).

[96] Renee L. Cyr, *The Americans with Disabilities Act: The Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 BROOK. L. REV. 1237, 1255 (1992). While reassignment is clearly recognized as a form of reasonable accommodation, it is only intended to be used as a last resort. *Id.*

[97] H.R. REP. NO. 485, *supra* note 74, at 63. The Report limits reassignment to those instances where the disabled worker can no longer perform the essential functions of his job and when a vacant position exists for which the worker is qualified. *Id.* "Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered." *Id.*

[98] 29 C.F.R. app. § 1630.2(o) (1992).

[99] *Id.* An employer is not required to keep the reassigned worker at the higher grade salary. *Id.*

[100] 840 F.2d 701 (9th Cir. 1988).

[101] *Chalk*, 840 F.2d at 703. The plaintiff was reassigned to an administrative position. *Id.* He then sought relief under the Rehabilitation Act of 1973. *Id.*

[102] *Id.* at 711. The court stated in closing that the plaintiff's condition could progress until it might eventually become a significant risk. *Id.* The court stated that some of the opportunistic diseases that could eventually strike the plaintiff might contribute to a determination of risk, since those diseases could be contagious to the students. *Id.*; *see* Martinez v. School Bd. of Hillsborough County, 861 F.2d 1502, 1506 (11th Cir. 1988) (determining whether reasonably accommodating AIDS-infected student through segregation was justified by risks).

ment of an HIV-infected pharmacist to a lower-grade, highly restricted position constituted discrimination because of the absence of a significant risk of transmission.[103] Reassignment appears to be the last reasonable accommodation consideration, after all other possibilities have been eliminated.[104]

D. UNDUE HARDSHIP IN REASONABLY ACCOMMODATING THE HIV-POSITIVE HEALTH CARE WORKER

Upon deciding that the HIV-positive employee can be reasonably accommodated in a manner which reduces or eliminates a significant risk of transmission, the health care employer must then determine whether the accommodation creates an undue hardship on the business in the form of a "significant difficulty or expense."[105] Undue hardship has been determined to exist when the cost of an accommodation "either (a) substantially impair[s] the ability of the employer to produce goods or produce services, or (b) impose[s] such a high cost that the employer would be forced to compensate by reducing the overall workforce."[106] In assessing the cost of accommodation, health care employers should consider the size, nature, and economic resources of both the facility in which the accommodation is to be made and the business enterprise in its entirety.[107]

Though health care employers may interpret even a moderate cost to be an undue hardship, congressional intent is quite clear that in making accommodations a business should expend any amount necessary short of that which would threaten the employer's financial security.[108] For example, in *Gardner v. Morris*,[109] the court ruled that the Army Corps of Engineers could not be forced to provide both laboratory facilities and a physician for a manic depressive worker who wished to accept a job in Saudi Arabia.[110] In this particular case, the court held that the costs of accommodation constituted an undue hardship on the employer.[111]

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[103] *See supra* notes 60-62 and accompanying text.

[104] *See supra* notes 96-99 and accompanying text.

[105] 42 U.S.C. § 12112(10)(A). Undue hardship is not limited to financial difficulty in providing an accommodation. 29 C.F.R. app. § 1630.2(p) (1992). Instead, the term is includes "any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." *Id.*

[106] Cooper, *supra* note 29, at 1454-55.

[107] 29 C.F.R. app. § 1630.2(p) (1992). In determining undue hardship in a franchise-type setting, it is important to distinguish between the facility at which the accommodation will be made and the business entity which supports the franchise. *Id.* If the franchisor-franchisee relationship only involves a yearly franchise fee payment, then the court should use only the resources of the franchise when making an undue hardship determination. *Id.* If, however, there is a more integrated relationship, the resources of the entire entity may be considered to determine what constitutes undue hardship. *Id.*

In judging the hardship involved, health care employers should not elevate hiring costs based on the possibility of future workers' compensation or tort liability.[112] Instead, the employer should focus upon the net cost of accommodation, as the employer may actually receive financial incentives for the implementation of some forms of accommodation.[113] Additionally, the courts will evaluate the hardship based on the number of present and future employees who will benefit from the suggested accommodation.[114] In the context of HIV-positive health care workers, hospitals will find it difficult to demonstrate that making an accommodation will not be beneficial to a large number of individuals, especially since the number of

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[108] Cooper, *supra* note 29, at 1450. The current minimum standard for undue hardship is somewhat lower than that set by the "bankruptcy provision" originally proposed in Congress. *Id.* at 1455.

[109] 752 F.2d 1271 (8th Cir. 1985).

[110] *Gardner*, 752 F.2d at 1283-84. The nearest hospital was a 13 hour drive away. *Id.* Air transportation was impossible on many occasions due to frequent dust storms. *Id.* Because travel could not guarantee adequate health care and because providing a physician and a lab on-site would require tremendous cost, the Corps was not required to accommodate the plaintiff. *Id.* at 1283-84.

[111] *Id.* at 1284. *But see* Cooper, *supra* note 29, at 1453-54 (stating that court's reasoning was flawed in finding undue hardship).

[112] Fitzpatrick, *supra* note 5, at 261.

[113] H.R. REP. NO. 485, *supra* note 74, at 69. Potential benefits include federal, state, and local tax deductions or tax credits. *Id.*

[114] *Id.* The basic assumption is that an accommodation to be used by more than one person in the present or future will reduce the accommodation's relative financial impact. *Id.* However, an accommodation used by only one person might also be considered essential, especially since the overall emphasis of the ADA is to encourage individualized analysis. *Id.*

HIV-infected workers continues to increase.[115]

Finally, courts may expect larger employers to be able to incur a higher cost of accomodation.[116] In *Nelson v. Thornburgh*,[117] the court held that an entity with an annual budget of $300 million should be able to absorb the annual cost of $6,638 in order to provide a reader for blind welfare case workers.[118] However, as noted in the legislative history, smaller employers may succeed in avoiding accommodation if doing so would pose an undue hardship.[119] This is of particular significance for local health clinics that operate within more modest budgets and provide the only such service in the area.[120] In such a case, to require reasonable accommodation of an HIV-infected employee might disrupt or threaten the clinic's ability to provide health care.[121] Most health care providers, however, may find it difficult to establish the undue hardship defense. Because the healthcare provider is already accustomed to adhering to numerous safety guidelines and procedures for prevention of disease transmission, the accommodation of the HIV-positive employee will likely be viewed to create only minimal disruption.[122]

III. CONCLUSION

With the rapid growth of HIV-infected individuals, most workplaces in the 1990s will be forced to confront the issues surrounding HIV-positive workers.[123] Past experience has shown that those workplaces which have already dealt with HIV and AIDS have often restricted or discharged infected employees on the basis of fear and paranoia.[124] However, what must be remembered by employers is that HIV in the workplace is not a question of political ideology or morality, but a matter of law with which the employer must comply.

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[115] Schatz, *supra* note 1, at 79. The author warns that placing an increasing number of restrictions on HIV-positive health care workers will simply drive others to avoid being tested for HIV, since testing positive could potentially result in major practice restrictions or job loss. *Id.*

[116] 29 C.F.R. app. § 1630.2(p) (1992). Though in some instances the resources of the entity as a whole will be used to determine undue hardship, this approach will often provide a distorted view of the resources of the smaller local facility at which the accommodation is to be made.

[117] 567 F. Supp. 369 (E.D. Pa. 1983).

[118] *Nelson*, 567 F. Supp. at 380. The court determined that if the department could spend $600,000 annually on travel expenses for county employees, then it could also afford to aid disabled workers. *Id.* at 380 n.20.

[119] H.R. REP. NO. 485, *supra* note 74, at 68.

[120] Cooper, *supra* note 29, at 1452.

[121] *Id.*

[122] Neugarten, *supra* note 14, at 1281.

The ADA provides a legal solution to the problems of employing HIV-positive individuals. In providing this solution, the ADA employs an individual, objective assessment of each HIV-positive worker and his role in the workforce rather than a hasty, generalization-based analysis.[125]

Although the ADA appears to be overwhelmingly geared toward the disabled employee, the ADA does in fact reflect both employer concerns and employee rights. This consideration for employer concerns appears quite clearly in the ADA's direct threat defense.[126] When using this approach with HIV-positive workers, the health care provider should first determine the existence of any significant risk of transmission to other workers or patients.[127] Current scientific evidence and CDC guidelines indicate, however, that as long as universal precautions are followed, HIV-positive health care workers pose a significant risk only in exposure-prone procedures.[128] Therefore, reasonable accommodation inquiries should only be conducted for workers engaged in these activities.[129]

In reasonably accommodating these workers, the health care provider does not have to lower its standards or modify job requirements.[130] Instead, the employer must only meet the job-related needs of the otherwise qualified worker, while at the same time eliminating or reducing the significant risk to an acceptable level.[131] Job restructuring will probably be the most attractive accommodation; however, if such restructuring or alternative accommodation fails to reduce the risk, job reassignment should be the final employer consideration before discharge.[132]

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[123] *See supra* notes 3-7 and accompanying text.

[124] *See supra* note 8 and accompanying text.

[125] *See supra* notes 38-39 and accompanying text.

[126] *See supra* notes 32-36 and accompanying text.

[127] *See supra* note 37 and accompanying text.

[128] *See supra* notes 40-67 and accompanying text.

[129] *See supra* note 71 and accompanying text.

[130] *See supra* notes 73-74 and accompanying text.

If reasonable accommodation is possible, the employer must then determine if the accommodation will impose an undue hardship on the business.[133] Although as a concept undue hardship reflects employer concerns, health care employers' success in using this as a basis for avoiding accommodation of HIV-positive employees will largely depend on the employer's size, nature, and economic resources.[134] Furthermore, in an industry that deals with AIDS and HIV in contexts other than employment, courts will probably find the undue hardship argument less convincing for health care employers than other businesses less able to handle the disease's risks.[135]

The ADA's legal solution to HIV in the workplace will be a bitter pill for most employers. Businesses will be forced to consider difficult employment issues and possibly expend capital resources in order to achieve a societal, rather than profit-motivated, goal. In most cases, businesses will have to accommodate the HIV-positive worker, especially if such businesses do not have similar transmission risks as exist in the health care context. Though the societal benefits are clear—including both the promotion of HIV-status awareness and the utilization of the skills of HIV-infected workers—the profit motive alone may provide sufficient incentive for compliance when the employer balances the costs of accommodation against those of litigation and negative publicity.

R. Bradley Prewitt

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[131] *See supra* notes 75-78 and accompanying text.

[132] *See supra* notes 79-104 and accompanying text.

[133] *See supra* notes 105 and accompanying text.

[134] *See supra* notes 106-108 and accompanying text.

[135] *See supra* note 122 and accompanying text.

DISCOVERY ABUSE AND A PROPOSED REFORM: MANDATORY DISCLOSURE

I. INTRODUCTION

The drafters of the 1938 Federal Rules of Civil Procedure intended a major departure from the previous rules. The prior rules required a full statement of each party's legal position and supporting facts to be established in the pleadings.[1] However, the current rules require only a "short and plain statement of the claim showing that the pleader is entitled to relief."[2] The sole purpose of modern pleading is to provide notice to the opposition, replacing the often burdensome pleadings which formerly existed with a new liberal discovery process.[3] The cherished element of surprise, which often determined the outcome of civil matters, was to be eliminated by a formal discovery system, designed to fully inform both sides of the necessary information and promote a proper trial on the merits.[4] The Federal Rules of Civil Procedure served as a model for the current rules of many states, including Mississippi which adopted the federal discovery rules in 1975[5] and the majority of the remaining federal rules in 1982.[6] The federal rules were designed to secure the "just, speedy, and inexpensive determination of every action,"[7] but the effectiveness of the rules in achieving this objective has been intensely criticized due to the increasing problems in the current discovery rules. This comment will examine the major complaints voiced against the federal rules, as well as the effectiveness of the various amendments to the rules. Additionally, this comment will detail the proposed solution of mandatory informal discovery.

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[1] WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 24 (1968). The difficulties in forcing each side to divulge all relevant evidence in the pleadings made these pleadings ineffective in obtaining adequate pretrial information. *Id.*

[2] FED. R. CIV. P. 8(a); *see* FED. R. CIV. P. 12(b)(6) (stating suits will not be dismissed for failure to state claim unless there are no grounds upon which relief can be granted).

[3] JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 5.7, at 253 (1985). Pleading technicalities are removed by the adoption of notice pleadings. *Id.* Discovery under the new rules was to be used to educate each party on the merits of their opponent's case. *Id.* § 7.1, at 380.

[4] William W. Schwarzer, *The Federal Rules, the Adversary Process and Discovery Reform*, 50 U. PITT. L. REV. 703, 703 (1989). One commentator announced that under the new federal rules "victory is intended to go to the party entitled to it, on all the facts, rather than to the side which best uses its wits." *Id.*

[5] LAWRENCE J. FRANCK, MISSISSIPPI LAW INSTITUTE ON STATE COURT DISCOVERY 2 (1975). Mississippi's pretrial discovery rules were modeled after the federal discovery rules. *Id.* The Mississippi rules became effective April 7, 1975. *Id.*

II. MODERN DISCOVERY PROBLEMS

The federal rules appeared effective during the thirty years following enactment, but became the subject of increasing criticism after 1970.[8] Since that time, many commentaries and articles have identified major problems and suggested possible solutions to the discovery escapade.[9] There is widespread agreement that the rising cost and extensive delay of litigation are primarily attributable to contemporary discovery problems.[10] The public's impulse to sue, and economic incentive to win, joined with the very nature of the adversary process upon which our judicial system is founded, might be the reasons for modern misuses and abuses of the discovery process.[11]

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[6] MISS. R. CIV. P., Order Adopting the Mississippi Rules of Civil Procedure. Also modeled after the federal rules, the Mississippi Supreme Court adopted the Mississippi Rules of Civil Procedure effective January 1, 1982. *Id.*

[7] FED. R. CIV. P. 1 official comment. The speedy and inexpensive resolution of civil procedures was recognized as the most important mandate of the rules, embodying the very "spirit of the rules." *Id.*

[8] Schwarzer, *supra* note 4, at 704. These problems were not inherent in the discovery system. *Id.* In support of this proposition, fewer than ten percent of lawyers surveyed in 1968 complained about discovery abuse. *Id.* Furthermore, the rules were actually amended in 1970 to reduce judicial involvement. *Id.*

[9] *See* Eric Herman, *Putting the Rocket in the Docket*, A.B.A. J., Oct. 1990, at 32, 32 (urging judges to take more active roles in order to control discovery abuses such as harassment and evasion); Jan Lewis, *Discovery Abuse: Plaintiff's Fight Back*, 26 TRIAL LAW. GUIDE, Oct. 1990, at 70, 71-74 (addressing problems of untimely responses, adverse inferences, and failure to attend depositions).

[10] Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 8-9 (1984). Discovery has become both an unnecessary expense and a major cause of delay in modern litigation. *Id.* at 9.

The drafters of the federal rules envisioned a discovery process that would provide information which was not cumulative, duplicative, or unduly burdensome or expensive to the opposing party.[12] In addition, the drafters intended the discovery rules to operate primarily extrajudicially.[13] However, if conflict between the parties on discovery matters occurred, the rules enabled judges to regulate discovery, after taking into account the relevant issues of the case. Upon identifying violations of the discovery rules, the court was given discretion to impose appropriate sanctions, including evidence exclusion and the extreme sanction of dismissal.[14] Yet, the drafter's noble intentions have not reached fruition, but rather their system seems to be crumbling due to discovery abuse.

This article does not imply that discovery abuse occurs in every case. The true extent of the problem cannot be adequately measured since most claims of discovery abuse are never reported and as such do not appear frequently in federal or state case law.[15] Even the phrase "discovery abuse" cannot be clearly defined by the government, since it can manifest itself in a plethora of forms.[16] The most reliable information on discovery abuse comes from the attorneys and judges in the form of surveys, studies, and articles.

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[11] Susan A. Yager, *Discovery Abuse: Have the 1983 Amendments to the Federal Rules Curbed the Problem?*, 37 FED'N INS. & CORP. COUNS. Q. 399, 403 (1987). Other factors which might influence discovery misuse, include attorneys' motivation for profit, judicial reluctance to penalize, and the purely win-oriented judicial system. *Id.* at 404.

[12] FED. R. CIV. P. 26(b)(1). The rules allowed a wide range of discovery, requiring only that the request not seek privileged information or inquire into matters irrelevant to the subject of the suit. *Id.*; *see* Glaser, *supra* note 1, at 11 (stating eliminating trickery, increasing relevant obtainable evidence, and defining issues are discovery purposes).

[13] Walter E. Oberer, *Trial by Ambush or Avalanche?: The Discovery Debacle*, 1987 MO. J. DISP. RESOL. 1, 4. The primary assumption was that lawyers were to be in charge of the discovery process. *Id.* This made "judges of lawyers and bystanders of judges," in effect putting the "goats in the cabbage patch." *Id.* at 3.

[14] FED. R. CIV. P. 37. A judge may compel discovery, and if the party fails to comply with such orders sanctions are allowed. *Id.*; *see* JAMES L. UNDERWOOD, A GUIDE TO FEDERAL DISCOVERY RULES 59 (1979) (stating that sanctions curtail problems such as dilatory tactics, harassment, and failure to attend depositions).

[15] PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 4 (1978). Only about five percent of federal cases report discovery abuse. *Id.* This is obviously attributed partly to the fact that many civil cases involve little or no discovery. *Id.* at 42.; *see* Yager, *supra* note 11, at 401

These authorities indicate that discovery abuse can appear in many forms including evasive responses, withholding information, and general non-compliance, as well as over-discovery, delay, harassment, and misuse of interrogatories.[17] In addition, discovery abuse is often evidenced through discovery requests entailing compliance costs disproportionate to the amount in controversy.[18] An extreme example of discovery abuse could entail the production of extensive and voluminous data in response to a legitimate request for a document, in order to purposely conceal the damaging document in the mass.[19] Thus, discovery has been called a vicious game which

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(controlling discovery abuse complicated by lack of reported abuse). *Compare* Read v. Southern Pine Electric Power Assoc., 515 So. 2d 916, 922 (Miss. 1987) (allowing testimony of witness although name withheld for discovery request) *with In re* Stevens, 523 So. 2d 319, 321 (Miss. 1988) (excluding testimony for violation of discovery rules).

[16] Yager, *supra* note 11, at 400. Discovery abuse manifests itself in a variety of forms. *Id.* Discovery may involve resistance to justified requests or excessive delays which serve to multiply costs. *Id.*

[17] Wayne D. Brazil, *Civil Discovery: Lawyer's Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 824-25. These problems were perceived by the surveyed attorneys as the most troublesome kinds of discovery abuses. *Id.*; *see* David S. Walker, *Professionalism and Procedure: Notes On An Empirical Study*, 38 DRAKE L. REV. 759, 765-66 (1988-89) (discussing discovery problem as major contributing factor in the decline of professionalism); *see also* Harris v. General Host Corp., 503 So. 2d 795, 798 (Miss. 1986) (discussing discovery rights and duties after excluding testimony for failure to reveal expert's name); Palmer v. Biloxi Regional Medical Center, Inc., 564 So. 2d 1346, 1366-68 (Miss. 1990) (dismissing case for failure to respond to interrogatories); Williams v. Puryear, 515 So. 2d 1231, 1232 (Miss. 1987) (dismissing case for conduct in discovery proceedings).

[18] Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989). Impositional discovery may inflict costs on the responding party far in excess of the social value of the information. *Id.* Often costs of discovery exceed the total recovery in the case. *Id.*; *see* A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 244 (1985) (noting that discovery was often used solely to inflict economic harm on opposition).

[19] Transportes Aereosole Angola v. Ronair, Inc., 104 F.R.D. 482, 500 (D. Del. 1985). The court dismissed the suit pursuant to its authority under the rules when, in response to a legitimate discovery request, the party produced fourteen

often involves trimming and cheating as a skill. These skills include construing a broad or vague discovery request so as to conceal the "smoking gun," and instructing support staff to bury or conveniently fail to find certain requested materials or documents.[20] Artful evasion of this sort may be far more common than many are willing to admit. One attorney candidly admitted that he would push the interpretation of the rules "right up to the line" to further the goals of a client.[21]

Over-discovery is another widely recognized discovery problem.[22] This usually entails attorneys attempting to uncover all information no matter how repetitive it might be. Often the fear of malpractice suits is the cause and in order to protect themselves attorneys feel inclined to "leave no stone unturned," no matter what they expect to uncover.[23] Over-discovery can also be attributed to an attorney stalling for time, attempting to substantiate a frivolous claim, and using form interrogatories, which are not tailored to the particular matter. These techniques require disclosure of irrelevant information.[24] Unfortunately, these exorbitant discovery requests

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boxes and five suitcases containing over a quarter of a million documents for the opposition to sift through. *Id.* The court considered this abuse to be so extreme as to warrant award of attorneys' fees as well. *Id.*

[20] Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2240 (1989). Highly developed dialectical skills have evolved in response to the discovery game. *Id.* Moreover, discovery problems have caused wide-spread concern and contempt inside the bar, yet no viable solution has emerged. *Id.*

[21] Stephanie B. Goldberg, *Playing Hardball*, A.B.A. J., July 1987, at 48, 50. The author details the serious problems of hardball, the most extreme example of discovery misuse. *Id.* at 48. The practice often entails evasion of interrogatories and other similar discovery abuses. *Id.* at 49-50; *see* Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., March 1988, at 78, 78 (rising hardball tactics involve use of discovery procedures for intimidation not fact finding).

[22] Weyman I. Lundquist & Frank F. Flegal, *Discovery Abuse - Some New Views About an Old Problem*, 2 REV. LITIG. 1, 5 (1981). As large firm practice increases and billable hours became a constant, lawyers acquired a new ingenuity for endless discovery. *Id.* at 5-6. Overdiscovery tends to defeat the purpose of the Federal Rules of Civil Procedure which is to secure the "just, speedy, and inexpensive" disposition of trials. Walker, *supra* note 17, at 765.

[23] Yager, *supra* note 11, at 402-03. Attorneys who are unsure of their claims tend to use excessive discovery requests in order to substantiate claims or cause indefinite delay. *Id.*

[24] *Id.* Numerous complainants detailed overly extensive interrogatories, resis-

are more often attempts to force a settlement by exerting pressure directly linked to the cost of complying with the requests. This practice is extremely prevalent in matters involving potentially large judgments or settlements.[25] One study estimated that as many as eighty to ninety-two percent of attorneys use economic burdens to force settlements.[26]

Surveys of attorneys and judges demonstrate the severity of discovery problems in modern litigation.[27] The 1980 Brazil survey indicated that a majority of the attorneys surveyed believed that major problems exist in the current discovery process.[28] The biggest complaints were evasive responses and noncompliance with discovery requests, cited by over sixty-one percent of those surveyed. This evasiveness was particularly prevalent in responses to interrogatories.[29] The attorneys attempted to disclose as little as possible hoping their adversary would back off or give up entirely.[30] Forty-nine percent of

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tance to disclosure and other forms of discovery abuse. *Id.* One commentator stated that discovery had become a "wasteful, time-consuming, dilatory, and expensive process." *Id.* at 403-04; *see also* Toyota Motor Corp. v. Greene, 483 So. 2d 130, 131-32 (Fla. Dist. Ct. App. 1986) (holding interrogatories should be tailored to produce only information reasonably calculated to lead to admissible evidence).

[25] Lundquist & Flegal, *supra* note 22, at 6. Harassment involves the exploitation of legitimate discovery methods in order to burden the opposition rather than to obtain necessary trial information. *Id.*; *see* Brazil, *supra* note 17, at 831 (over forty-five percent of attorneys handling large cases complained of harassment).

[26] Levin & Colliers, *supra* note 18, at 244. Attorneys responded that work and economic pressures were substantial factors in their use of discovery. *Id.* One attorney stated that as long as the courts permitted these techniques, his firm would continue to use similar pressures. *Id.* at 244-45.

[27] *See* Walker, *supra* note 17, at 789 (survey of Iowa attorneys detailing discovery problems); Sherman A. Cohn, *Federal Discovery: A Survey of Local Rules and Practice in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253, 263 (1978) (probing discovery problems and examining effectiveness of various local rules in curbing abuses).

[28] Brazil, *supra* note 17, at 790. One hundred and eighty Chicago area litigators were interviewed to determine their "attitudes toward, assessments of, and experiences with the present system of civil discovery." *Id.* The survey statistically detailed the attorneys' responses when asked of the effectiveness, principal abuses, and major obstacles in conducting discovery. *Id.*

[29] *Id.* at 825. The attorneys surveyed described evasiveness as the habit of manipulating the wording of discovery requests, interpreting interrogatories, document demands, and deposition questions in a manner that best served the client's interests. *Id.* at 829. Twenty-eight percent of the attorneys specifically cited evasive responses to interrogatories. *Id.*

[30] *Id.* The difficulties encountered due to evasive practices were extreme, frus-

those surveyed believed over-discovery was also a major problem under the rules. Lawyers whose cases tended to be large and complex complained of over-discovery more frequently than those whose cases involved lesser amounts.[31] Nearly forty percent believed that much of this type of over-discovery amounted to harassment, an important distinction, since harassment is far more severe than the uneconomical use of discovery. Harassment represents the outright abuse of the discovery process.[32] Furthermore, delay and excessive costs, forty-three and forty-one percent respectively, were also major survey complaints with the discovery process.[33]

The discovery problems do not appear to have dissipated since Brazil's 1980 survey. In 1989, a Harris Poll survey of state and federal judges indicated that forty-seven percent believed that abuse of the discovery process remains a major cause of delay in modern litigation.[34] Another forty-six per-

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trating lawyers in every type of practice. *Id.* The survey suggested that extensive rule revision was needed. *Id.*

[31] *Id.* at 825. Sixty-two percent of attorneys who handled large cases complained of overdiscovery. *Id.* at 831. In addition, overdiscovery complaints were cited more often by defense attorneys than plaintiffs' attorneys. *Id.* at 832. Evasion complaints were evenly distributed. *Id.*; *see* Yager, *supra* note 11, at 401 (discovery abuses more common in complex cases such as securities, trade regulation, tort law, antitrust law, and environmental law).

[32] Brazil, *supra* note 17, at 831; *see* Levin & Colliers, *supra* note 18, at 245 (abuse carries connotations of impropriety while uneconomical use does not always entail such belief).

[33] Brazil, *supra* note 17, at 825. Attorneys complained of two types of delay, "the long wait for a trial date" and "opponent's dilatory tactics or extended tardiness in responding to discovery requests." *Id.* at 827. The costs of responding to discovery requests were outrageous, and surprisingly, attorneys representing clients with the "deepest pockets" complained most frequently about these costs. *Id.* These cost concerns often severely hamper discovery efforts of attorneys in smaller cases, as well as presenting major obstacles for both attorneys and clients in complex litigation. *Id* at 828.

[34] Harris & Associates, Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spent at Least Half of Their Time on General Civil Cases*, 69 B.U.L. REV. 731, 735 (1989). The survey solicited responses from 200 federal judges and 800 state judges concerning a variety of problems in the judicial system. *Id.* at 731. Thirty-four percent of state judges cited abuse of discovery as a severe problem in the system. *Id.* at 736. Both state and federal judges attacked the overall discovery process, and eighty-one percent indicated discovery possessed some problems. *Id.* at 737; *see* Walker, *supra* note 17, at 789 (noting similar concerns of Iowa litigators).

cent believed discovery abuse represented at least a minor problem.[35] Discovery complaints substantially outweighed all other judicial problems cited by the judges.[36] The predominate belief was that the existing discovery techniques substantially increased the costs of litigation.[37] Over-discovery was pinpointed as the primary cause behind the rise in discovery costs by over sixty-nine percent of the judges. Closely behind, at sixty-four percent, was the belief that discovery was used only as an adversarial tool to intimidate opponents and thereby force settlements.[38]

The proper place to begin to understand the problem is its root, the adversarial process. Arguably, the major reason that discovery abuse exists is "because lawyers trained in and committed to a system governed by the adversary process are not conditioned to function effectively in the pretrial environment envisioned by the Federal Rules."[39] In sum, pretrial discovery and the adversarial process are counterproductive to each other. The "adversarial ideal is not to give in but to fight - fairly, to be sure, but to fight - and let the court decide."[40]

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[35] Harris, *supra* note 34, at 735. Fifty-five percent of state court judges reported similar problems. *Id.* at 736.

[36] *Id.* at 735. Federal judges also voiced complaints indicating that there were too few judges to adequately handle the caseload. *Id.* State judges complained of too few judges as often as they complained about abuses of the discovery process. *Id.* at 734-35.

[37] *Id.* at 751. Most judges cited excessive costs in many types of cases. *Id.* This was an especially prevalent in high stakes litigation. *Id.* Seventy-five percent of federal judges cited excessive costs in complex litigation, in addition the federal judges believed personal injury and contract dispute cases also involved excessive costs. *Id.*

[38] *Id.* The major complaint was that lawyers attempted to turn over every stone instead of applying a cost benefit analysis. *Id.* Many of the over-discovery problems were attributed to lawyers' fear of malpractice actions. *Id.* at 753. Sixty-four percent of federal judges believed that over-discovery was also used to force settlement. *Id.*

[39] Schwarzer, *supra* note 4, at 705. There is a general belief that the gap between the lawyers' traditional advocacy role and the ideals of the discovery system is widening. *Id.* The focal point for the legal profession remains the adversarial idea, yet, this same spirit is undermining the purpose of the discovery system. *Id.*; *see* Mark A. Nordenburg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543, 561-62 (1980) (concluding that need to win prompts attorneys to fight discovery and to develop sharp practices due in large part to unsupervised nature of discovery).

[40] Schwarzer, *supra* note 4, at 714. "Adversarial techniques are not conducive

This process encourages attorneys to configure any method within the possible boundaries of the rules, to conceal a document, prohibit a witness from revealing harmful evidence, and to generally be non-cooperative, making adversaries perform unnecessary and excessive work to get the evidence needed for the fair adjudication of the matter.[41] This was not the intended purpose of the discovery rules. The rules were designed to expedite the process of gaining information, and to do so inexpensively.[42]

The most extreme example of the adversary influence in discovery is evidenced by modern "hardball" techniques.[43] This is the resistance to even the most rudimentary discovery requests, often evidenced by preplanned distractions and constant clarification requests.[44] The influx of adversarial techniques into the discovery process rarely, if ever, produces the results the framers intended. Instead, the outcome is increased litigation costs and far too often, extensive delays.

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to nonconfrontational approaches" such as envisioned in an ideal discovery process. *Id.*; *see* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1051 (1975) (attacking the fundamental principles of discovery rules).

[41] Glaser, *supra* note 1, at 234. Each side is motivated to hide information, especially information or witnesses exposure of which could cause severe adverse consequences to the client. *Id.* Much controversy centers around the specific discovery devises and adversarial refusals to divulge relevant contentions. *Id.* at 235. In short, the adversary system prompts attorneys to search for any "substantive or tactical objection" in order to avoid revealing valued information. *Id.*

[42] FED. R. CIV. P. 1; *see* Yager, *supra* note 11, at 401 (discovery abuse impedes court access by increasing costs of litigation as well as wasting valuable judicial and litigant time); Nordenburg, *supra* note 39, at 548-49 (stating that "average litigant is overdiscovered").

[43] Schwarzer, *supra* note 4, at 715. Arguments range from allegations that "hardball" tactics are bad advocacy, inept professionalism, and bad character to the standard assertion that lawyers are required to do their best for the client. *Id.* This reflects the conflict between the adversarial instinct and the general desire for civility in the profession. *Id.*; *see* STEPHEN GILLERS & NORMAN DORSEN, REGULATION OF LAWYERS: PROBLEMS AND LAW AND ETHICS 524-39 (1989) (discussing hardball techniques and their adversarial roots).

[44] Gillers & Dorsen, *supra* note 43, at 526 (describing firm encouraging clients to challenge deposition inquiries); *see* Sayler, *supra* note 21, at 78 (stating that hardballer's primary goal was to make life miserable for opposition by manipulating facts, abusing discovery, and abandoning all semblance of common courtesy and civility).

As indicated, the increase in litigation costs is attributed primarily to discovery abuse and misuse.[45] One commentator noted that "even litigators who are becoming wealthy primarily because of fees attributed to discovery, expressed amazement and concern about the rapid escalation of the expense of complying with discovery."[46] The result has been that a large majority of the public are no longer able to afford the costs associated with a lawsuit.[47] This general inaccessibility has contributed, at least partially, to the Supreme Court's loosening of modern advertising laws.[48]

Delay in litigation is also a result of discovery abuse.[49] Delay inherently flows from the stalls and procedural challenges accompanying discovery abuse. Discovery delay coupled with the dramatic increase in lawsuit filings, which has been estimated to have increased 145 percent in a recent ten-year period,[50] has created a problem which is beyond the scope of this comment.[51]

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[45] Levin & Colliers, *supra* note 18, at 229. The major cause of escalating costs was believed to be pretrial discovery. *Id.* The authors detailed the numerous amendments which attempted, unsuccessfully, to curb in discovery costs. *Id.*; *see* Maurice Rosenburg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579, 579 (1981) (alleging that wild fishing expeditions associated with discovery abuse cause ever-increasing court costs).

[46] Wayne D. Brazil, *Views from the Frontlines: Observations by Chicago Lawyers about the System of Discovery*, 1980 AM. B. FOUND. RES. J. 217, 233-34. "The wastefulness, delay, and friction" surrounding the discovery process increases the costs of litigation. *Id.* at 233.

[47] Levins & Colliers, *supra* note 18, at 221. Many believe that if the courts of this country cannot reduce the price tag on litigation then we will be forced to adopt alternative dispute resolutions methods. *Id.*

[48] Bates v. State Bar of Arizona, 433 U.S. 350 (1977). In approving the use of legal advertising, the Supreme Court relied in part on the fact that seventy percent of the public did not have access to proper legal services due to excessive costs. *Id.* The Court believed liberal advertising laws might help reduce such costs. *Id.*

[49] Yager, *supra* note 11, at 399. Both resistance to proper discovery requests as well as unfounded and excessive discovery have resulted in delays in the system. *Id.*; *see* Walker, *supra* note 17, at 764 (delay now is predominant in of all civil litigation); Levin & Colliers, *supra* note 18, at 227 (noting that cases are constantly increasing in length as well as cost).

[50] Levin & Colliers, *supra* note 18, at 227. Studies have shown a continuing increase in the number of cases filed in district courts. *Id.* Between 1973 and 1983 a 145% increase was noted with a 17.5% increase in 1982-83. *Id.*

[51] *But see* Austin Sarat, *The Litigation Explosion, Access to Justice, and Court*

These problems have prompted cries for reform. The major remedy suggested was greater judicial intervention.[52] Therefore, attempts were made in 1980 and 1983 to increase the discretionary powers of federal judges.[53] Extensive modifications were made to Rules 7, 11, 16, and 26 of the Federal Rules of Civil Procedure in 1983, in an attempt to encourage more judicial sanctions.[54] Yet, the concern is that these amendments have done little to curb the discovery abuse problem or to prompt the judiciary to assume the far more active role intended when these changes were adopted.[55]

The demand for a more active judicial role in the discovery crisis is not meritless, but one can hardly expect judicial involvement to cure all discovery ills.[56] Judicial time is recognized as one of the scarcest and most prized resources of the legal system.[57] Further, it is widely recognized that the initiation of new litigation has reached an all time high. Therefore,

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Reform: Examining the Critical Assumptions, 37 RUTGERS L. REV. 319 (1985) (discussing reasons to doubt that litigation is result of overload and inaccessibility to courts); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U.L. REV. 527 (1989) (discussing effect of court backlog in forcing settlements).

[52] Nordenburg, *supra* note 39, at 543. Curtailment of discovery abuse, in the author's view, must entail constant vigilance and supervision by the bench. *Id.*; *see* Yager, *supra* note 11, at 406 (suggesting increased judicial activism to check discovery abuse); *see* Brazil, *supra* note 17, at 825 (largest survey complaint about current discovery process was failure of bench to issue adequate sanctions and promulgate sufficient controls to check discovery abuse).

[53] *See* 446 U.S. 997 (1980) (1980 rule modifications); 97 F.R.D. 165 (1983) (1983 rule modifications).

[54] Yager, *supra* note 11, at 401. The aim of the 1983 amendments was to control the abuse of discovery, and to prevent abusive practices the modified rules encouraged judicial sanctions. *Id.*

[55] SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 4 (Fed. Jud. Center 1985). The sanctions allowed by the 1983 amendments, although effective when used, are not generally applied due to judicial reluctance. *Id.* One reason for this judicial reluctance is that the rules place the full burden of deciding between legitimate and improper discovery on the court. Yager, *supra* note 11, at 402.

[56] *But see* FED. R. CIV. P. 16 advisory committee's note (fixing of time limits by judiciary may force litigants to narrow issues, reduce expenditures and reduce the total time to adjudication).

[57] Levin & Colliers, *supra* note 18, at 241. Although the possible advantages of judicial involvement are inviting, the countervailing consideration of lack of judicial time will limit effectiveness. *Id.* at 242.

given the current number of state and federal judges, and the dockets that are already backlogged, it is difficult to conceive that anyone can realistically expect the judiciary to maintain a high rate of disposition and still be able to examine the often extremely complex problems associated with discovery abuse complaints.[58] This, coupled with the fact that many judges refuse to take an active role in a system that was initially designed to operate extrajudicially,[59] substantially reduces the likelihood of judicial involvement becoming the cure for modern discovery abuse. In reality, recent criticism has prompted some judges to become more involved while many others have refused, resulting in a confusing and inconsistent approach in the system as a whole.[60]

Reform of the discovery process is needed in order to secure the timely, inexpensive, and fair resolution of suits. But identifying discovery problems is a far easier task than formulating an effective remedy. This question has been the most troubling to commentators and the federal rules advisory bodies. As noted, the previous revisions to the rules have had little appreciable effect in curbing the problem.[61] Commentators have suggested a wide variety of solutions from re-education of attorneys, in order to remove the adversarial instinct, to switching to a loser pays system similar to that in England. Each of these reforms would represent an extreme departure from our present system.[62] Accordingly, neither appears to be a reasonable alternative.

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[58] *Id.* This is not a departure from the spirit of the rules, only a recognition of the judiciary's inability to handle its current caseload effectively due to the litigation explosion. *Id.* Additionally, unless the size of the judiciary is increased, it is only logical to assume that judicial time will continue to be a scarce resource. *Id.*

[59] Nordenburg, *supra* note 39, at 555. Ideal discovery was designed to proceed with minimal judicial involvement. *Id.* The general view is that judges' time is too valuable to be consumed supervising discovery. *Id.* at 557; *see* Oberer, *supra* note 13, at 3 (stating that present rules intend to place lawyers in charge of discovery process).

[60] Yager, *supra* note 11, at 409. The author stated that "apparent haphazard judicial sanctioning results in predictability difficulties and uncertainty for litigators." *Id.* The lack of an objective standard encourages attorneys to continue their abusive practices. *Id.* at 416.

[61] *See supra* notes 52-60.

The answer to the discovery mess must come in the form of a simple but effective means that will curtail the adversarial impact on the discovery process and reduce costs and delay without placing extensive burdens on scarce judicial time.[63] Quite a tall order for any rule, yet, many authorities believe they have discovered just such a rule in the guise of mandatory informal discovery.

III. MANDATORY INFORMAL DISCOVERY

The Advisory Committee on Civil Rules[64] recently drafted proposed changes to the current discovery rules which would require certain mandatory disclosures.[65] It appears very likely that this committee will soon promulgate a new discovery rule requiring mandatory informal discovery.[66] This new rule is designed to facilitate the exchange of documents and pertinent information between trial participants without resort to adversarial formal discovery procedures.[67]

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[62] Easterbrook, *supra* note 18, at 646. In a loser-pays system the unsuccessful party would be required to pay all court costs and attorneys' fees similar to the federal fee shifting statutes. *Id.* at 647.

[63] *See* John P. Frank, *The Rules of Civil Procedure - Agenda for Reform*, 137 U. PA. L. REV. 1883, 1891 (1989) (stating "[t]he scalpel having been attempted unsuccessfully, it is now time for the axe").

[64] FEDERAL RULEMAKING: PROBLEMS & POSSIBILITIES, 5-6 (Fed. Jud. Center, 1981). The Advisory Committee circulates initial drafts of amendments and redrafts the originals after considering comments from the bench and bar. *Id.* The revised drafts are then sent and reviewed by the Standing Committee on Rules of Practice and Procedure, then the Judicial Conference of the United States, thereafter the proposal is sent to the Supreme Court and Congress for ultimate approval. *Id.* at 6-7.

[65] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, *reprinted in* 112 S. Ct. 259 (1991) [hereinafter Preliminary Draft]. The amendments would substantially modify current Rule 26(a) by adding a section entitled "Required Disclosures; Methods to Discover Additional Matter." *Id.* at 14, 112 S. Ct. at 293. The modification was prompted by the Civil Justice Reform Act of 1990, which urged courts to adopt plans to reduce costs and delays in litigation. *Id.* at 4, 112 S. Ct. at 273.

[66] *Id.* at xv, 112 S. Ct. at 269. Prior to 1991 the committee drafted two other similar proposals in 1990 which, after extensive review, resulted in the 1991 proposed rules. *See* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 803 (1991); just prior to the publication of this comment, the Judicial Conference published in

The proposal requires each party to disclose certain types of information at three distinct phases in the lawsuit. The first of these disclosures is to occur within 30 days after an answer is filed by a defendant.[68] Each party must then identify any person likely to have significant information about claims or defenses in the suit,[69] describe any document likely to have a significant bearing on the case,[70] disclose any information pertaining to the damages claimed,[71] and provide op-

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advance sheets the 1992 proposed amendments to the discovery rules which were virtually identical to the 1991 version to be considered by the Supreme Court. Proposed Amendments to the Federal Rules of Civil Procedure, U.S.C.S. Cumulative - Late Case and Statutory Service 3929 (West 1993). For reference ease the 1991 version will be cited throughout this comment.

[67] Preliminary Draft, *supra* note 65, at 2-4, 112 S. Ct. at 272-73; *see* Mullenix, *supra* note 66, at 803 (concluding that formal discovery practice has become so encumbered with excess motion practice that aims of rules are no longer being met).

[68] Preliminary Draft, *supra* note 65, at 15, 112 S. Ct. at 293-94 (Proposed Rule 26). A parties failure to have completed investigation of the case does not discharge this obligation. *Id.*

[69] *Id.* at 14-15, 112 S. Ct. at 293-94. Under the proposed 26(a)(1), each party shall disclose:

> (1) Initial Disclosures . . .
>
> (A) the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, identifying the subjects of the information;

Id. The committee felt that disclosure of only those witnesses' testimony whose general contentions would support a party's contentions would not be burdensome. *Id.* at 27, 112 S. Ct. at 306 (Proposed Rule 26 committee notes).

[70] *Id.* at 15, 112 S. Ct. at 294 (Proposed Rule 26(a)(1)(B)). Each party shall disclose:

> (1) Initial Disclosures . . .
>
> (B) a copy of, or a description by category and location of, all documents, data, compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense;

Id. The committee intended this to act as a substitute for routine interrogatory requests, since it is often more appropriate to simply turn over relevant documents for examination. The committee pointed out that any description should be sufficient to accurately point to the needed documents and enable the opposition to easily request full production though formal discovery. *Id.* at 27, 112 S. Ct. at 306 (Proposed Rule 26 committee notes).

[71] *Id.* at 4, 112 S. Ct. at 273. Each party must reveal:

posing counsel with all relevant insurance information.[72] Only after all of the required first round disclosures are made can formal discovery begin.[73] The bulk of this information under existing discovery rules is normally obtained through interrogatories. This procedure proposes to limit the necessity to resort to such formal methods.[74]

Then, at an appropriate point in the proceedings, as determined by the parties or the court, any party who intends to solicit expert testimony must provide the other litigants with a written report from each expert. The report is to detail all points of the testimony intended to be offered as well as include any exhibits which an expert might use to support his opinion.[75] Finally, approximately 30 days before the trial, the

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> (1) Initial Disclosures . . .
>
> (C) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material on which such computation is based, including material bearing on the nature and extent of injuries suffered . . . "

Id. at 15, 112 S. Ct. at 294 (Proposed Rule 26(a)(1)(C)).

[72] *Id.* (Proposed Rule 26(a)(1)(D)). The required insurance disclosure is identical to a provision under the current rules. *Id.* Disclosure of insurance information under the disclosure provisions does not render the information admissible in evidence. *Id.*

[73] Preliinary Draft, *supra* note 65, at 4-5, 112 S. Ct. at 273-74. The Committee asserted that formal discovery should not commence until the parties simultaneously disclosed the required information. *Id.*

[74] *Id.* The information gained by the disclosures is normally obtained through discovery, which should now be unnecessary. *Id.*

[75] *Id.* at 16, 112 S. Ct. at 295 (Proposed Rule 26(a)(2)(A)). The expert testimony disclosure in relevant part states:

> (2) Disclosure of Expert Testimony . . .
>
> (A) In addition to the disclosures required in paragraph (1), each party shall disclose to every other party any evidence that the party may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness which includes a complete statement of all opinions to be expressed and the basis and reasons therefore; the data and other information relied upon in forming such opinions; any exhibits to be used as a summary of or to support such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified . . . within the preceding four years.

parties must disclose any witnesses or documents they expect to present at trial.[76]

Accompanying these broad disclosure requirements are presumptive limits on the use of depositions and interrogatories, since disclosure procedures will limit the need to resort to expansive, formal discovery methods.[77] However, the court retains discretionary authority to alter the disclosure requirements and expand the limits of formal discovery in the proper circumstances.[78] Additionally, scheduling conferences will

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Id. These disclosures should be made at a minimum of ninety days before trial. *Id.* Formerly, information pertaining to experts obtained through interrogatories, was often vague and incomplete and rarely dispensed with need to depose expert, all of which disclosure is to eliminate. *Id.* at 29, 112 S. Ct. at 308 (Proposed Rule 26 committee notes).

[76] *Id.* at 17, 112 S. Ct. at 296 (Proposed Rule 26(a)(3)). Pretrial disclosures are required unless the information is used solely for impeachment. *Id.* The rule requires the following disclosures:

> (3) Pretrial Disclosures . . .
>
> (A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;
>
> (B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken by stenographic means, a transcript of the pertinent portions of such deposition testimony; and
>
> (C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Id. Any objections to these disclosures must be made within fourteen days or they are waived. *Id.* The aim of these disclosures is to eliminate the cost and time required to obtain information in formal discovery and to promote settlement and a proper trial on merits. *Id.* at 29-30, 112 S. Ct. at 308-09 (Proposed Rule 26 committee notes).

[77] *Id.* at 5, 112 S. Ct. at 274. The amendments propose to limit the number of total depositions under Rules 30 and 31 of the Federal Rules of Civil Procedure to a total of ten, combined, with no oral deposition to extend beyond six hours. *Id.* Additionally, proposed rule 33 limits the total number of interrogatories which may be served from one party on another to fifteen. *Id.* at 7, 112 S. Ct. at 276.

[78] Preliminary Draft, *supra* note 65, at 34, 112 S. Ct. at 313 (Proposed Rule 30(a)(2)); *Id.* at 49, 112 S. Ct. at 328 (Proposed Rule 33(a)). Further, the court may eliminate disclosure requirements in lawsuits in which little or no discovery is needed. *Id.* at 4, 112 S. Ct. at 274.

assume greater importance, allowing the judge to establish the limits and timing of any additional discovery. The attorneys are expected to have exchanged and discussed any disclosures and future discovery needs prior to this conference.[79]

The proposed rule also carries strict sanctions for noncompliance. Each attorney is required to verify the accuracy of their disclosures and to seasonably supplement inadequate and incorrect information therein.[80] Failure to make required disclosures could result in preclusion of the undisclosed information as well as the imposition of traditional sanctions, such as the award of attorneys' fees.[81] These sanctions give the rule a practical working effect. Accordingly, it would be very difficult to avoid the required disclosures without sufficient justification.

The proposed rule intends that counsel view themselves as officers of the court rather than purely as advocates of the client during discovery.[82] The rule strikes at the heart of the problem, curtailing adversarial instincts during the discovery process. The rule strives to eliminate the "poker hand" concept in civil discovery and focuses on promoting a proper trial on the merits.[83]

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[79] *Id.* at 4-5, 112 S. Ct. at 273-74. Although the substance of Rule 16 will change only slightly, its provisions are expected to become of increasing importance in enforcing the new disclosure requirements. *Id.* Rule 16 will afford courts the ability to set timing and limitations of discovery tailored to the particular circumstances. *Id.* at 9-10, 112 S. Ct. at 288-89.

[80] *Id.* at 25, 112 S. Ct. at 304 (Proposed Rule 26(a)). Under Rule 26(g) of the proposed rules, the signature of an attorney or party is required and certifies that the disclosure is complete at the time it was made. *Id.* If these disclosures are not correct and properly supplemented Rule 26(g)(3) authorizes appropriate court sanctions. *Id.* Rule 26(e) of the proposed rules requires supplementation of any disclosures when the party learns the information is not complete and correct. *Id.* at 23, 112 S. Ct. at 302.

[81] *Id.* at 4-5, 112 S. Ct. at 273-74; *see* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1353 (1978) (suggesting that failure to disclosure could result in disciplinary action as well as full dismissal of pending suit).

[82] Brazil, *supra* note 81, at 1353. As court officers, the rule should require counsel to diligently seek out all information relevant to the trial and voluntarily exchange it with opposing counsel. *Id.* However, the attorneys would remain in their advocate roles during trial and post-trial proceedings. *Id.* at 1350; Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 52 (1982). Although Frankel's disclosure approach would require a curtailment of the attorney-client privilege, which the proposed draft does not suggest, its focus is very similar, urging lawyers to think of themselves as "ministers of justice." *Id.*

The proposed rule has been called a "fairly radical" idea, since the current rules of civil procedure do not contemplate anything more than formal discovery.[84] Yet, the actual practice of informal discovery is not foreign to the legal practitioner. Many lawyers have used informal discovery, which has appeared both as a matter of civility and from attorneys' unwillingness to burden judges with discovery matters.[85] However, the current practice is far from universal and is abandoned at the discretion of the attorney. The new proposal would expand and mandate informal discovery practices. Thus, even though mandatory informal discovery might be a radical change, it should not be difficult to interject into the system since most attorneys have used similar procedures in the past.

The idea of mandatory informal discovery is rapidly gaining advocates, receiving support in legal periodicals[86] as well as various state and federal courts.[87] The Supreme Court of Arizona recently adopted an experimental disclosure rule which promotes the same concepts as the Advisory Committee draft.[88] The new proposal itself is based on the experience of several district courts, which adopted disclosure requirements in their local rules.[89] The Central District of Florida and the Southern District of California adopted provisions that require mandatory exchange of documents and other evidence, as well as production of a list of witnesses that each party intended to use at trial.[90] The underlying reason for this growing support is that mandatory informal discovery provides the greatest hope of achieving a timely and inexpensive determination of civil actions, a goal rarely achieved under the current rules.

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[83] Mullenix, *supra* note 66, at 806; *see* Schwarzer, *supra* note 4, at 721 (by shifting to discovery and eliminating burdensome formal discovery devices, which have no intrinsic value, objectives of obtaining full disclosure in order to conduct fair trials can be accomplished).

[84] Mullenix, *supra* note 66, at 807. The current federal discovery rules assume that attorneys will use only the standard discovery tools described in the rules. *Id.*

[85] *Id.* at 811. Informal discovery has frequently been used in complex litigation, as well as administrative proceedings. *Id.*; *see* MANUAL FOR COMPLEX LITIGATION § 21.422 (2d ed. 1985) (recommending informal discovery to save both time and expense).

[86] Loren Kieve, *Discovery Reform*, A.B.A. J., Dec. 1991, at 81, 86. "The great experiment of discovery is demonstrably an object failure. It should be eliminated, period." *Id.* The author advocates a pure disclosure system with extremely limited formal discovery. *Id.*; William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure be More Effective Than Discovery?*, JUDICATURE, Dec.-Jan. 1991, at 178, 179. The author believed that best way to eliminate excessive costs and delays in discovery is to adopt disclosure procedures. *Id.*

[87] *See* Civil Justice Expense and Delay Reduction Plan (E.D. Tex.) (effective Dec. 31, 1991). The Plan adopts various procedures to control excessive costs and delays, including various provisions requiring mandatory disclosures. *Id.*

Nevertheless, commentators have expressed numerous concerns regarding the potential effectiveness of a disclosure rule.[91] A major concern is whether more than mere technical compliance with the proposed rule can be achieved.[92] Thus, will attorneys be able to develop techniques to avoid compliance with the new rule, as they have with the existing discovery rules?[93] Unlike the current rules, the proposal specifies unambiguous disclosure requirements, thus eliminating the opportunity to distort or artfully construe a discovery request.[94] Additionally, attorneys must supplement all disclosures and, properly administered, courts should permit no less than full compliance.[95] Any attempt to use undisclosed information should result in the automatic exclusion of the evidence, absent compelling reasons for nondisclosure. Thus, avoidance of the disclosure requirements, through evasive answers, etc., will be extremely difficult.

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[88] ARIZ. R. CIV. P. 26.1 committee comment (experimental rules for Maricopa County 1990) (effective Dec. 21, 1990). The committee stated that the rules were adopted in order to avoid "unnecessary and protracted discovery" as well as to encourage early suit resolution. *Id.*

[89] Preliminary Draft, *supra* note 65, at 1, 112 S. Ct. at 270. The proposed amendments to the rules should reduce, if not eliminate, the excessive delays and expense inherent in civil litigation. *Id.*; *see* ARIZ. R. CIV. P. 26.1 official committee report (experimental rules for Maricopa County) (effective Dec. 21, 1990) (disclosure rules are intended to prevent surprise, promote professionalism, and prohibit adversarial conflicts in inappropriate situations).

[90] C.P. CAL. B. 6.1.1-6.1.4; S.D. FLA. R. 14. These rules adopt substantially identical disclosure procedure:

> 1. Documents - To exchange all documents then reasonably available to a party which are then contemplated to be used in support of the allegations of the pleading filed by the party. Documents later shown to have been reasonably available to a party and not exchanged may be subject to exclusion at time of trial.
>
> 2. Discovery Schedule - To agree upon a preliminary schedule for all discovery in the matter.
>
> 3. Other evidence - To exchange any other evidence then reasonably available to obviate the filing of unnecessary discovery motions.
>
> 4. List of Witnesses - To exchange a list of witnesses then known to have knowledge of the facts supporting the material allegations of the pleading filed by the party.

Id.

[91] Mullenix, *supra* note 66, at 820. As yet, no study has shown the efficiency of such practice or the results opined from informal discovery. *Id.* at 810. The author suggests examining both Florida and California's local rules to determine the effectiveness of the rule. *Id.* at 820-21. *But see* Richard E. Moot, *Considering Doing No Discovery*, LITIG., Fall 1988, at 39, 42 (describing successful use of min-

Commentators also question whether the rule will actually reduce the need for formal discovery.[96] Certainly, the rule will eliminate interrogatories formerly used to uncover lay and expert witnesses, identity of documents, insurance information, and damage estimation, since such information must be mandatorily disclosed.[97] The need to depose each expert will

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imum or no discovery in several complex and routine cases).

[92] Mullenix, *supra* note 66, at 821. The author stated that it appears the committee is going through with a "new universal procedural rule" without sufficient study. *Id.* The author believed that the advisory committee was proceeding with a new federal rule based solely on good intentions and limited information from a few practitioners and judges. *Id.*

[93] *Id.*; *see supra* notes 52-55.

[94] *See* Schwarzer, *supra* note 4, at 722. Parties would understand what they are required to produce without the potential to misinterpret a discovery request. *Id.* There would be limited opportunities to engage in harassment or obstruction since disclosure requirement are unambiguous. *Id.*

[95] *See* Preliminary Draft, *supra* note 65, at 56-57, 112 S. Ct. at 335-36 (Proposed Rule 37(a)). Proposed Rule 37(a) authorizes the court to compel disclosure or impose any other appropriate sanction. *Id.* An evasive or an incomplete disclosure is treated as a failure to disclose. *Id.*; *see supra* notes 80-81.

[96] Mullenix, *supra* note 66, at 820. The author questioned in what circumstances lawyers believed they should conduct formal discovery even after the required disclosures had been made. *Id.* Also suggested was a probe to determine when attorneys are more likely to voluntarily comply with the spirit of the law. *Id.*

[97] Preliminary Draft, *supra* note 65, at 4, 112 S. Ct. at 276. Given the disclosure requirements interrogatories will no longer be needed to obtain much of the information typically sought in discovery requests. The Committee recognized that interrogatories were often used as a means of harassment and limitation of

be reduced, since the proposal requires experts to disclose the bulk of their expected testimony.[98] Additionally, initial disclosures will identify any significant documents bearing on the case and all information relating to damages. This will expedite requests for documents needed for the fair adjudication of the matter while eliminating the need for expansive discovery to uncover the proverbial "needle in the haystack."[99] Finally, each party must disclose all documents that might be presented at trial, which amounts to a standing request for production under Rule 34.[100]

Consistent with this goal of reducing formal discovery, the proposal places explicit limits on the use of formal discovery devices. Only ten depositions and fifteen written interrogatories are allowed for each party, and no documentary requests are allowed prior to the initial disclosure.[101] Thus, the rule reduces both the need and ability to conduct formal discovery.

In addition, it warrants consideration whether the proposed reform will place an excessive burden on the judiciary in assuring proper compliance. Commentators opinions vary on this issue, from the belief that proper enforcement would require an expanded judiciary[102] to the contention that the rule would actually free judicial time.[103] Both contentions are cor-

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use was desirable. *Id.* at 51, 112 S. Ct. at 330 (Proposed Rule 33 committee notes); *see also supra* notes 68-74.

[98] *See supra* notes 75-76 and accompanying text.

[99] Preliminary Draft, *supra* note 65, at 27, 112 S. Ct. at 306 (Proposed Rule 26 committee notes); *see* Schwarzer, *supra* note 4, at 722 (initial production of documents should increase pace of depositions since all relevant documents will be at hand).

[100] Preliminary Draft, *supra* note 65, at 27, 112 S. Ct. at 36 (Proposed Rule 26 committee notes).

[101] *Id.* at 5, 112 S. Ct. at 274. The Commission drafted revisions to Rule 30 limiting examination to six hours, noting that in courts adopting similar rules the parties normally can agree on deponents and division of time. *Id.* The Commission produced revised Rule 33, Interrogatories to Parties, since experience indicated that limiting the number of interrogatories was both useful and manageable. *Id.* at 7, 112 S. Ct. at 276.

[102] Brazil, *supra* note 81, at 1357. Brazil suggested a full disclosure system, whereas the proposed system still allows limited formal discovery. *Id.* Brazil believed that disclosure monitoring would greatly increase the burden on the judiciary. *Id.* Yet, the system of disclosure was nevertheless urged, due to the possible cost reduction to the public. *Id.*

[103] Schwarzer, *supra* note 4, at 722-23. Schwarzer believed that since discovery

rect, since upon initial enactment the judiciary will have to devote considerable time and energy to assure proper compliance with the rule. The judiciary must establish a strict compliance standard and, thereafter, the judiciary's role will be greatly reduced. Once strict penalties for nondisclosure are established the judiciary's duty should constitute primarily imposition of sanctions for noncompliance.[104] Though no procedural rule operates entirely free of judicial involvement, the proposed draft, by reducing the use of traditional discovery devices and replacing them with unambiguous disclosure requirements, will surely decrease the need for judicial oversight.

IV. CONCLUSION

The federal discovery rules were intended to facilitate the "just, speedy, and inexpensive determination of every action." However, increasing problems with discovery prevents the accomplishment of this objective.[105] Attorneys and judges cite evasion, non-compliance, delay, harassment, and over-discovery as common problems.[106] Consequently, attorneys often misconstrue discovery requests to favor their client, discover any information bearing on the case, regardless of its value, force settlements by using discovery as economic leverage, and in extreme instances, "play hardball," challenging the most rudimentary discovery requests.[107] The root of these problems is the adversarial instinct of attorneys,[108] and the result is increased litigation cost and needlessly delayed disposition of claims.[109]

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would be virtually eliminated, the burdens of monitoring disclosure compliance would be virtually the same as under the previous system. *Id.*

[104] *See* Schwarzer, *supra* note 4, at 722-23. Schwarzer believed that the courts should support the spirit of the rule with the threat of sanction. *Id.* Disclosure should function with relatively little judicial intervention except as to matters of sanction, privilege and materiality. *Id.*

[105] *See supra* notes 7-11 and accompanying text.

[106] *See supra* notes 27-38 and accompanying text.

[107] *See supra* notes 17-28, 44 and accompanying text.

[108] *See supra* notes 39-44 and accompanying text.

[109] *See supra* notes 42, 45-51 and accompanying text.

The legal system will no longer ignore these problems. Several attempts were made to halt such abuses, ultimately failing due to the overwhelming burden placed on the judiciary, while other proposals were too drastic to effectively implement into the judicial system.[110] But, mandatory disclosure, a procedure familiar to most attorneys, represents a reform which should decrease litigation cost and delay without unduly burdening the judiciary.[111]

The rule will certainly have a beneficial impact on future discovery practice.[112] It should eliminate many of the disruptive practices associated with evasive responses and excessive discovery requests under the current system.[113] Further, little reason should exist for the parties to engage in harassment or obstruction in the disclosure phases since the parties will be fully cognizant of the required disclosures and the penalties for noncompliance. Additionally, the rule will virtually eliminate the temptation to distort or artfully construe discovery requests in order to avoid revelation of information.[114] Finally, the rule will bring increased compliance with Rule 11, since each party is required to submit evidence supporting their claim and failure to do so would amount to a near admission of a violation.[115]

A rule such as this is badly overdue, and it holds great promise in alleviating the problems of discovery abuse. The rule's primary objective is to curtail the adversary instinct in the discovery process by reducing formal discovery, and, thereby, the opportunity to resort to adversarial techniques. Thus, the rule attacks the very root of the discovery problem. Since the rule will certainly decrease the need for formal discovery it should substantially reduce the delay and excessive cost commonly associated with modern litigation. In sum, the rule will serve to refocus the "narrow litigant interest in winning on the broader systematic interest in the speedy, inexpensive, and just resolution" of civil matters.[116]

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[110] *See supra* notes 52-62 and accompanying text.

[111] *See supra* notes 63-67 and accompanying text.

[112] Brazil, *supra* note 81, at 1349. The author believed that a reform which reduced the adversarial conflicts frustrating discovery, such as the current proposal, would bring meaningful reform to the civil rules. *Id.*

[113] *See supra* notes 91-100 and accompanying text.

[114] *See supra* notes 91-95 and accompanying text.

[115] Schwarzer, *supra* note 4, at 723. The disclosure rule should compel attorneys to conduct pre-filing investigations to establish sufficient factual background for their claims. *Id.*

Meade W. Mitchell

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[116] Mullenix, *supra* note 66, at 827. Additionally, the rule should end "gamesmanship" practices which are prevalent under the current discovery rules. *Id.*

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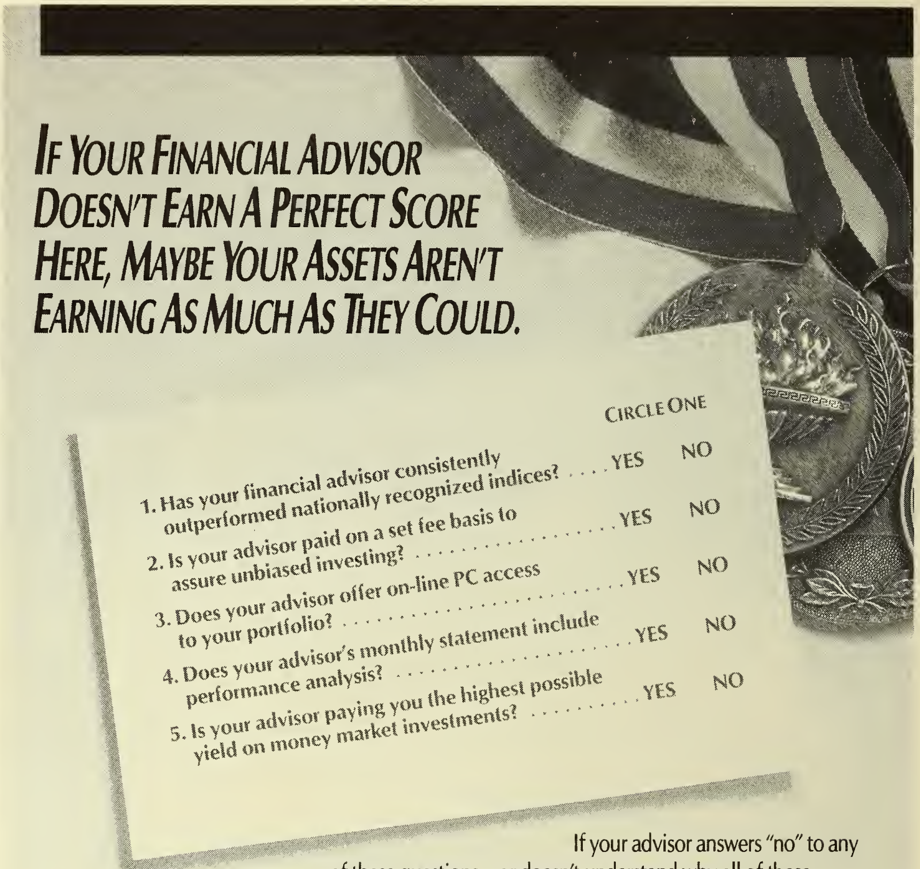

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